No. 91-1480

In The
Supreme Court of the United States
October Term, 1991

Supreme Court, U.S.
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CITY OF PONCA CITY, a
Municipal Corporation,
Petitioner,

v.

HOUSING AUTHORITY OF THE KAW
TRIBE OF INDIANS OF OKLAHOMA,
Respondent.

Petition For A Writ of Certiorari To The
United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW:

1. Whether an Indian housing authority, which is created by state law and is an agency of a state, is a "person", and therefore an "aggrieved person", as defined under Section 802 of the Fair Housing Act (42 U.S.C. §3602), who may institute suit against a different political subdivision of the same state under Section 813 of the Fair Housing Act (42 U.S.C. §3613).

2. Whether a federal court must give to a state court judgment the same preclusive effect as would be given that judgment under the law of the state in which the judgment was rendered where (a) the issues raised in the subsequent federal court litigation could have been, but were not, raised by the federal court plaintiff in the previous state court litigation involving the identical parties, and (b) where the federal court defendant was the plaintiff and the federal court plaintiff was the defendant in the previous state court litigation.

3. Whether a defendant which had successfully sought a motion to dismiss pursuant to Fed. R. Civ. P. 12

(b)(6) must file a cross-appeal in order to assert as a basis for supporting the order dismissing the case a basis which the district court had rejected.

TABLE OF CONTENTS

	Page
Questions Presented for Review.	i
Table of Contents	iii
Table of Authorities.	v
Opinions Below.	2
Jurisdiction.	3
Constitutional Provisions and Statutes Involved . . .	3
Statement of the Case	5
Argument.	9
Synopsis.	9
I. Allowing a governmental entity such as Kaw Housing Authority to proceed under the Fair Housing Act amounts to an improper judicial expansion of the statutory scheme of the Fair Housing Act.	10
II. Failure to accord full faith and credit to a prior state court judicial proceeding is a serious departure from accepted and usual course of judicial proceedings and conflicts with the decisions of other federal courts of appeal and this Court	23

III. Requiring a successful litigant to file a cross-appeal from a judgment dismissing all claims is in conflict with applicable decisions of this Court and is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. 37

Conclusion. 41

TABLE OF AUTHORITIES

Page

Cases:

Aetna Insurance Co. v. Ralls,
200 Okla. 32, 190 P.2d 787 (1948) 31

Allen v. McCurry,
449 U.S. 90 (1980) 24

Banks v. City of Ardmore,
188 Okla. 611, 112 P.2d 372 (1941) 31

Blum v. Bacon,
457 U.S. 132 (1982) 39

Board of Governors of the Federal Reserve System v. Dimension Financial Corp.,
474 U.S. 361 (1986) 15

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.,
467 U.S. 837 (1984) 38

Citizens State Bank of Hugo v. Hall,
413 P.2d 513 (Okla. 1966) 31

Dandridge v. Williams,
397 U.S. 471 (1970) 38

Davis v. Passman,
442 U.S. 228 (1979) 11,14,17,21

Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma,
426 U.S. 776 (1976) 16

Garcia v. San Antonio Metropolitan Transit Authority,
469 U.S. 528 (1985) 18,34

Gladstone, Realtors v. Village of Bellwood,
441 U.S. 91 (1979) 10,11,17,20,21

Green v. Bock Laundry Mach. Co.,
490 U.S. 504 (1989) 18

Haring v. Prosise,
462 U.S. 306 (1983) 24

Havens Realty Corp. v. Coleman,
455 U.S. 363 (1982) 17,20

Huffman v. Western Nuclear, Inc.,
486 U.S. 663, 672 (1988) 15

Jett v. Dallas Independent School Dist.,
491 U.S. 701, 735 (19 16,19

Karahlios v. National Federation of Federal Employees,
489 U.S. 527 (1989) 15

Kelley v. Kelley,
447 P.2d 774 (Okla. 1968) 31

Kremer v. Chemical Construction Corp.,
456 U.S. 461 (1982) 24,25,26,27,30,33,35

Marrese v. American Academy of Orthopaedic Surgeons,
470 U.S. 373 (1985) 24,25,26

Massachusetts Mutual Life Ins. Co. v. Ludwig,
426 U.S. 479 (1976) 38

Middlesex Cty. Sewerage Authority v. National Sea Clammers Ass'n,
453 U.S. 1 (1981) 15

Migra v. Warren City School Dist. Bd. of Educ.,
465 U.S. 75 (1984) 24

Mobil Oil Corp. v. Higginbotham,
436 U.S. 618 (1978) 15

Montana v. United States,
440 U.S. 147 (1979) 27,40

Morse v. Earnest, Inc.,
547 P.2d 955 (Okla. 1976) 31

National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers,
414 U.S. 453 (1974) 19

Northcross v. Board of Educ. of the Memphis City Schools,
412 U.S. 427 (1973) 22

Oscar Mayer & Co. v. Evans,
441 U.S. 750 (1979) 21

Parsons Steel, Inc. v. First Alabama Bank,
474 U.S. 518 (1986) 24,26

Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp.,
485 U.S. 495 (1988) 16,17

Ray v. Atlantic Richfield Co.,
435 U.S. 151 (1978) 17

Sanford's Estate v. Commissioner of Internal Revenue,
308 U.S. 39 (1939). 16

Scroggins v. Kansas,
802 F.2d 1289 (10th Cir. 1986) 28

Thigpen v. Roberts,
468 U.S. 27 (1984) 39

TVA v. Hill,
437 U.S. 153, 194 (1978) 19

Washington v. Confederated Bands and Tribes of the Yakima Indian Nation,
439 U.S. 463 (1979) 38

Statutes:

28 U.S.C. §§1254(1) 3

28 U.S.C. §§1331 5

28 U.S.C. §§1343 5

28 U.S.C. § 1738 . . . . . 3, 23, 24, 25, 26, 28

28 U.S.C. §2101(c) 3

29 U.S.C. §§ 621 et seq 22

42 U.S.C. § 1981 5,7,8

42 U.S.C. § 1982 5,7,8

42 U.S.C. § 1983 5,7,8

42 U.S.C. §2000e 4,12,13,18,21,22

42 U.S.C. §§ 3601 et seq 5,12,21

42 U.S.C. § 3602 3,4,11,12,13,17,22

42 U.S.C. § 3604 11,20

42 U.S.C. § 3613 4,5,7,11,12,16,19,20

Okla. Stat. tit. 12, Ch. 2, App. 29,32

Okla. Stat. tit. 63, §§ 1051 et seq 5,34

Miscellaneous:

Fed. R. Civ. P. 12(b)(6) 2,7

Fed. R. Civ. P. 41(b) 38

Rule 13, Rules of the Supreme Court 1

Rule 13, Rules for District Courts of Oklahoma . 29,32

H. R. Rep. No. 711, 100th Cong., 2nd Sess., reprinted in 1988 . . . . . 17, 20

O. Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417 15,16

Wright, Miller and Cooper, *Federal Practice and Procedure* §4471 (Supp. 1991) 28,35

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Petition For A Writ of Certiorari To The
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PETITION FOR WRIT OF CERTIORARI

Petitioner, The City of Ponca City, respectfully prays that a Writ of Certiorari be issued to review the judgment of the Court of Appeals for the Tenth Circuit, entered in this proceeding on December 19, 1991, as authorized by Rule 13 of the Rules of the Supreme Court of the United States.

OPINIONS BELOW

On December 19, 1991, the United States Court of Appeals for the Tenth Circuit rendered its opinion on the appeal from the United States District Court for the Western District of Oklahoma, affirming in part and reversing in part the judgment of the district court. The December 19 opinion, which is to be reported as *Housing Authority of the Kaw Tribe of Indians of Oklahoma v. City of Ponca City*, 952 F.2d 1183 (10th Cir. 1991), is included in petitioner's appendix at page 1. On September 22, 1989, the United States District Court for the Western District of Oklahoma granted petitioner's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). That judgment is included in petitioner's appendix at page 56. The transcript of the September 22, 1989, hearing is included in petitioner's appendix at page 62. On March 9, 1990, the United States District Court for the Western District of Oklahoma denied respondent's (plaintiff's) motion to reconsider dismissal of its complaint. That

order is included in petitioner's appendix at page 59. The complaint is in petitioner's appendix at page 44.

JURISDICTION

On December 19, 1991, the United States Court of Appeals for the Tenth Circuit entered the judgment sought to be reviewed. The statutory provisions believed to confer on this Court's jurisdiction to review the judgment in question are 28 U.S.C. §§ 1254(1) and 2101(c). This petition for certiorari is filed within 90 days after the entry of judgment by the Tenth Circuit.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

28 U.S.C. §1738

State and Territorial statutes and judicial proceedings; full faith and credit

Such * * * judicial proceedings * * * shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

42 U.S.C. §3602(d)

"Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11 of the United States Code, receivers and fiduciaries.

42 U.S.C. 3602(i)

"Aggrieved person" includes any person who-
(1) claims to have been injured by a discriminatory housing practice; or
(2) believes that such person will be injured by a discriminatory housing practice that is about to occur.

42 U.S.C. §3613(a)(1)(A) **Enforcement by private persons**

(a) **Civil action.**

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this title, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

42 U.S.C. §2000e(a). **Definitions**

For the purposes of this title -

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11, United States Code or receivers.

STATEMENT OF THE CASE

Respondent, Housing Authority of the Kaw Tribe of Oklahoma ("Kaw Housing Authority"), is an Oklahoma state agency organized under the provisions of Okla. Stat. tit. 63, §§ 1051 *et seq*. In its complaint (*see* appendix at page 44) filed in the United States District Court for the Western District of Oklahoma on April 21, 1989, Kaw Housing Authority sought relief from the City of Ponca City, an Oklahoma municipal corporation, under 42 U.S.C. §§ 1981, 1982 and 1983, and under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq*. Jurisdiction was invoked pursuant to 28 U.S.C. §§ 1331, 1343, and 42 U.S.C. §

3613 (*see* appendix at page 45, ¶ 4).

The basis of the complaint is that Ponca City allegedly discriminated against Kaw Housing Authority for racial reasons by refusing to approve an agreement to allow Kaw Housing Authority to purchase homes within the corporate limits of Ponca City. Although Ponca City did not itself own the homes, the State of Oklahoma requires Kaw Housing Authority to seek Ponca City's permission before operating within the boundaries of the municipality. The city council of Ponca City voted to approve the agreement. The mayor vetoed the resolution, however, and the council upheld the veto. (*See* appendix at pages 46-49).

The complaint in this case alleges that shortly after Ponca City declined to approve the agreement, according to the complaint, Ponca City filed a lawsuit in state court against Kaw Housing Authority, seeking an injunction barring Kaw Housing Authority from purchasing or owning homes within the corporate limits of Ponca City without first having the city's permission. The complaint then

alleges that the state court judge issued the requested permanent injunction.[1] (*See* appendix at pages 48-49).

Ponca City, the petitioner, responded to the complaint in this case by filing a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), asserting that Kaw Housing Authority, as a political subdivision of the State of Oklahoma, has no federal constitutional rights which it can enforce against another political subdivision of Oklahoma under the Civil Rights Acts of 1866 and 1871, and, therefore, is an improper party plaintiff under Sections 1981, 1982 and 1983. The motion also sought dismissal because Kaw Housing Authority does not qualify as an "aggrieved person" who can maintain an action

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[1] According to documents submitted to the federal trial court in this case by both parties in response to petitioner's Rule 12(b)(6) motion to dismiss, Kaw Housing Authority had responded to the state court lawsuit by filing a combined motion for summary judgment and motion to dismiss. At the hearing on the motions, the state court judge granted summary judgment against Kaw Housing Authority, and thereby entered the requested permanent injunction. Several weeks later, Kaw Housing Authority instituted this action.

against Ponca City under Section 3613 of the Fair Housing Act. Finally, the motion to dismiss asserted that Kaw Housing Authority was barred by the doctrine of *res judicata* from asserting these claims.

The trial court denied the motion to dismiss based upon the doctrine of *res judicata*. But the trial court granted the motion to dismiss based upon the first two propositions. The trial court also denied Kaw Housing Authority's subsequently filed motion for a new trial. (*See* appendix at page 56).

After granting Ponca City's motion to dismiss, the trial court denied Kaw Housing Authority's timely filed motion for reconsideration. Kaw Housing Authority subsequently filed its notice of appeal to the United States Court of Appeals for the Tenth Circuit. The City of Ponca City filed no cross-appeal. On December 19, 1991, the Tenth Circuit affirmed the trial court's decision dismissing the claims under Sections 1981, 1982 and 1983, but reversed the trial court's decision dismissing the claim under the Fair Housing Act. The Tenth Circuit also held

that the doctrine of *res judicata* does not apply in this case, either because there was insufficient evidence that Kaw Housing Authority had a full and fair opportunity to litigate its claims in the previous state court litigation, or because the City of Ponca City had not filed a cross-appeal of the district court's ruling granting its motion to dismiss.

ARGUMENTS

SYNOPSIS

The decision below, if left unreviewed, will drastically alter concepts of federalism, comity and separation of powers. Additionally, it will work a significant revision of the rules of litigation.

The impact on the federal system is two-fold: 1. The opinion withdraws from states the right to regulate the relative powers of their political subdivisions; and 2. The opinion withdraws from state court judgments the finality which is the keystone of the federal judicial system. Worse, the appellate court accomplishes this by

ignoring the dictates of this Court -- it substitutes its notions of claims preclusion for those of the Federal Full Faith and Credit Act and state law.

The court of appeals' opinion also amounts to a judicial endorsement of the practice of altering the statutory scheme adopted by Congress, and substituting for the legislation the result that the court prefers. Furthermore, the Tenth Circuit order alters the rules of litigation, by requiring a defendant, who was absolutely successful in obtaining complete dismissal of all counts, to appeal that decision in order to preserve alternative bases for supporting the dismissal order. This petition demonstrates the reasons that the Court should grant certiorari to review the order of the court below.

POINT I:

Allowing a governmental entity such as Kaw Housing Authority to proceed under the Fair Housing Act amounts to an improper judicial expansion of the statutory scheme of the Fair Housing Act.

In *Gladstone, Realtors v. Village of Bellwood*, 441

U.S. 91 (1979), this Court invited a petitioner for certiorari to properly raise the question whether a governmental entity is a "person" or a "private person" under the Fair Housing Act. The Court specifically stated in *Gladstone* that that question was "not properly before us, and we express no views on it." 441 U.S. at 109 n. 21. *Gladstone* concerned standing under the Fair Housing Act. This case concerns the question whether the plaintiff, Kaw Housing Authority, "is a member of the class of litigants that may, as a matter of law, appropriately invoke the power of the court...." *Davis v. Passman*, 442 U.S. 228, 239 n. 18 (1979). In contrast to *Gladstone*, this case properly raises those issues as a matter of law, and presents the reasons that a governmental agency, such as Kaw Housing Authority, is neither a "person", nor a "private person", nor even an "aggrieved person".

Because the complaint specifically states that it is an attempt to maintain an action under 42 U.S.C. §§ 3602, 3604 and 3613, Kaw Housing Authority must be

one of the class of persons who is entitled to maintain a civil action under those statutes. *See* appendix at page 44. Section 3613 allows a private person to maintain a civil action if that person is an "aggrieved person". According to Section 3602, the definitions section of the Fair Housing Act, an "aggrieved person" is any "person" who claims to have been injured by an impending discriminatory housing practice or believes he will be injured by such a practice. According to Section 3602(d):

> "Person" includes one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual company, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 of the United States Code, receivers, and fiduciaries.

It is instructive to compare this definition, enacted as section 802(d) of the Civil Rights Act of 1968, with Title VII of the Civil Rights Act of 1964. Under the 1964 Act:

> The term 'person' includes one

> or more individual, **governments, governmental agencies, political subdivisions,** labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 or receivers.

42 U.S.C. §2000e(a) (emphasis added). As the comparison makes plain, Sections 2000e(a) and 3602(d) are virtually identical, with the exception that the Fair Housing Act omits the words, "governments, governmental agencies, political subdivisions," from its definition of the term "person".

Instead of focusing on whether Congress authorized a state agency to bring a Fair Housing Act claim in this case, the court below simply looked to determine why Congress might not have authorized such a claim. This puts the cart before the horse. Either Congress did, or it did not, empower Kaw Housing Authority to sue Ponca City under the Fair Housing Act.

Furthermore, the Tenth Circuit misconstrued the issue before it as if it were a question of standing. Indeed, "[t]he Court of Appeals appeared to confuse the question of whether [respondent] had standing with the question of whether [it] had asserted a proper cause of action." *Davis v. Passman*, 442 U.S. at 239 n.18. The point was not whether such and such a person had standing to sue. Instead, the question was whether a certain type of entity is a "person" at all. The issue is one of *cause of action*, not standing. 442 U.S. at 239 n. 18.

The court below betrays the basis of its opinion in the conclusion to its footnote 16 when it says that "we are satisfied that Congress intended the result we reach here." Yet, the question is not what Congress intended, but what Congress did. And, according to virtually every traditional rule of statutory construction, Congress did not include Kaw Housing Authority as a "person" under the Act.

What the Tenth Circuit has done is to apply its own concept of the broad purposes that it believes Congress

should have had in mind in adopting the Fair Housing Act, as opposed to looking at precisely what Congress actually enacted. This method of reasoning is improper. *Cf. Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 373-374 (1986); *Huffman v. Western Nuclear, Inc.*, 486 U.S. 663, 672 (1988). As the Court has stated, it is inappropriate for the judiciary to prescribe a different class of beneficiaries of a statutory scheme than Congress has specifically enacted. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625-626 (1978). *See also Karahlios v. National Federation of Federal Employees*, 489 U.S. 527, 532-533 (1989); *Middlesex Cty. Sewerage Authority v. National Sea Clammers Ass'n*, 453 U.S. 1, 15 (1981). "[W]e have no authority to substitute our views for those expressed by Congress in a duly enacted statute." *Mobil Oil Corp. v. Higginbotham*, 436 U.S. at 626.

Almost one hundred years ago, one of the greatest legal minds in American history wrote, "We do not inquire what the legislature meant; we ask only what the statute

means." O. Holmes, *The Theory of Legal Interpretation*, 12 Harv. L. Rev. 417, 419 (1899). Here, by contrast, the Court of Appeals simply determined what it thinks the proper outcome should be, and substituted that for what Congress actually enacted. Congress stated that particular "persons" have power to enforce the provisions of the Fair Housing Act. It is those persons, and only those persons, who may bring lawsuits under Section 3613.

Under the time-honored doctrines of 1. *expressio unius est exclusio alterius*, *cf. Jett v. Dallas Independent School Dist.*, 491 U.S. 701, 735 (1989), 2. the construction together of statutes governing the same subject matter, *cf. Flint Ridge Development Company v. Scenic Rivers Association of Oklahoma*, 426 U.S. 776, 787-788 (1976); *Sanford's Estate v. Commissioner of Internal Revenue*, 308 U.S. 39 (1939), and 3. even the basic assumption that states have authority to regulate their own territory and that a clear statement is required before a judge will find federal preemption of state law,

see, e.g., Puerto Rico Dep't of Consumer Affairs v. Isla Petroleum Corp., 485 U.S. 495, 500 (1988); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157 (1978) - under all of these doctrines, only one result is appropriate. The Fair Housing Act did not empower one political subdivision of a state to sue a sister political subdivision.

Interestingly, this is not a case where the legislative history, or even the administrative interpretation is particularly enlightening. Reading, for example, that the use of the term, "aggrieved person", in Section 3602 is meant "to reaffirm the broad holdings of [*Bellwood* and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982),]" - elucidates the issue of standing, *cf. Davis v. Passman*, 442 U.S. at 239 n. 18 (*Bellwood* concerned standing, not *cause of action*), but does not elucidate who is included within the scope of the term, 'person'. *See* H. R. Rep. No. 711, 100th Cong., 2nd Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 2173, 2184. That issue, until today, has not been before the Court, and was not in those two cases.

Likewise, this is not a case where the plain text of the statute results in an absurdity. *Cf. Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 510-511 (1989). To the contrary, the plain language makes sense. This lawsuit really concerns the relative powers of sister political subdivisions of the same state. That is an issue traditionally relegated to state law. *Cf. Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). The Tenth Circuit's interpretation of the Fair Housing Act, however, results in a serious breach of notions of federalism, by allowing sister political subdivisions of the same state to challenge each other's state law statutory authority. Such a result should not be implied without a clear statement that Congress intends precisely that result. *Isla Petroleum Corp.*, 485 U.S. at 500. This is a case where the plain language of the statute, especially when compared to the text of Section 2000e(a), dictates the conclusion that Kaw Housing Authority cannot sue Ponca City under the Fair Housing Act.

The question in this case is not what a court thinks Congress should have done. Congress, not the courts, has the exclusive power "to formulate legislative policies and mandate programs and projects [and] establish their relative priority for the Nation." *TVA v. Hill*, 437 U.S. 153, 194 (1978). "[W]hatever the limits of the judicial power to imply or create remedies, it has long been the law that such power should not be exercised in the face of an express decision by Congress concerning the scope of remedies available under a particular statute." *Jett v. Dallas Ind. School Dist.*, 491 U.S. at 732. "[C]ourts should not expand the coverage of the statute to subsume other remedies...." *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). The question in this case is not what Congress should have done, but what Congress did.

The Fair Housing Amendments Act of 1988 replaced former Section 3612 with current Section 3613. The new provision allows for enforcement by an "aggrieved person", in contrast to the old law, which had

used the broad term, "plaintiff". Indeed, the new statute uses the active voice - "[a]n aggrieved person may commence a civil action ..." - whereas the repealed provision used the all-inclusive, passive voice ("the rights granted by §§ 3603, 3604, 3605, and 3606 of this Title may be enforced by civil actions ...."). Thus, the new provision, in contrast to the old, precisely provides who may employ it - an "aggrieved person". But, a governmental agency, like Kaw Housing Authority, is not a "person", and therefore cannot be an "aggrieved person".

Standing under Section 3613 may be as broad as that afforded by Article III. Indeed, the legislative history of the 1988 amendments so indicates. *See* H. R. Rep. No. 711, 100th Cong., 2nd Sess., *reprinted in* 1988 U.S. Code Cong. & Admin. News 2173, 2184. Although *Gladstone,* and *Havens Realty,* clarified the issue of standing under the Fair Housing Act, these cases never examined the scope of the term "person" insofar as a governmental entity is concerned. That is, they never

reviewed the issue of *cause of action* under the Fair Housing Act. *Cf. Davis v. Passman*, 442 U.S. at 239 n. 18. Indeed, in *Bellwood*, this Court specifically stated that it did not consider the issue whether the village was a "person" or a "private person" under the Fair Housing Act. *Bellwood*, 441 U.S. at 109 n. 21. By contrast, this case squarely and properly presents the issue.

Whether a governmental entity is a "person" under the Fair Housing Act is an important question of federal law which has not been, but should be, settled by this Court. If the words defining the term "person" in the Civil Rights Act of 1964 and the Civil Rights Act of 1968 are to have any meaning at all, they cannot be identical. The use of the terms "governments, governmental agencies, political subdivisions," in Title VII of the 1964 Act cannot possibly have the same significance as has their exclusion from Title VIII of the 1968 Act.

In *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979), the Court, per Justice Brennan, unanimously endorsed the practice of construing together civil rights

statutes which in relevant part are "virtually *in haec verba*...." 441 U.S. at 755. Because the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq*., and, as here, Title VII of the Civil Rights Act of 1964, used similar words and had similar purposes, they should be construed *pari materia*. *See also Northcross v. Board of Educ. of the Memphis City Schools*, 412 U.S. 427, 428 (1973) (Emergency School Aid Act of 1972 and Civil Rights Act of 1964 construed "*pari passu*").

Likewise, Sections 2000e(a) and 3602(d) should be construed *pari materia*. Because the one statute adds "government, governmental agencies, political subdivisions," to its definition of the term, "person", and the other does not, the latter must not include those entities when it refers to a "person".

Congress could have defined "person" as one or more individuals or entities of any type. Or it could have chosen to define the term in any number of broad ways. But it did not do so. Instead, Congress purposely used

the words, "governments, governmental agencies, political subdivisions," in one civil rights statute but did not do so in the other civil rights statute. Allowing a court to substitute its unsubstantiated notions of Congressional intent for the plain meaning of Congressional acts is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

POINT II:

Failure to accord full faith and credit to a prior state court judicial proceeding is a serious departure from the accepted and usual course of judicial proceedings and conflicts with the decisions of other federal courts of appeals and this Court.

According to 28 U.S.C. § 1738:

> [T]he records and judicial proceedings of any such State ... shall have the same full faith and credit in every court within the United States....

This means that a "federal court must give to a state-

court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. 75, 81 (1984). As this court has clarified in the context of a Title VII claim, "the comity and federalism interests embodied in § 1738 are not compromised by the application of *res judicata* and collateral estoppel..." in this type of civil rights litigation. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 478 (1982).

In case after case over the past decade, this Court has repeatedly held that it was fundamental error for a court of appeals to refuse to consider the possible preclusive effect under state law of a prior, state-court judgment. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986); *Marrese v. American Academy of Orthopaedic Surgeons*, 470 U.S. 373, 375, 380, 384 (1985); *Migra,* 465 U.S. at 81; *Haring v. Prosise*, 462 U.S. 306 (1983); *Kremer,* 456 U.S. at 485; *Allen v. McCurry*, 449 U.S. 90, 96 (1980). In this case, however,

the Tenth Circuit completely ignored the clearly expressed law as enunciated by this Court and as practiced by every other circuit court of appeals[2] in this country. In so doing, the Tenth Circuit has made a "fundamental departure from traditional rules of preclusion." *Kremer*, 456 U.S. at 485.

The provisions of the Federal Full Faith and Credit Act generally require that a court "consider first the law of the State in which the judgment was rendered to determine its preclusive effect." *Marrese*, 470 U.S. at 375. Furthermore, Section 1738 specifically commands that federal courts may not employ their own rules of *res judicata* to determine the effect of a state court judgment, but instead must accept the rules chosen by the State from which the judgment is taken. 470 U.S. at 380 (quoting *Kremer*, 456 U.S. at 481-482). This Court has repeatedly instructed the courts of appeals not to attempt

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[2] *See generally* cases collected in Wright, Miller & Cooper, *Federal Practice & Procedure* § 4471 n. 7 (Supp. 1991). *See also Concordia v. Bendekovic*, 693 F.2d 1073, 1077-1078 n. 6 (11th Cir. 1982).

to "determine the preclusive effect of a state court judgment without regard to the law of the State in which judgment was rendered." *Marrese*, 470 U.S. at 380; *see also Parsons Steel*, 474 U.S. at 525; *Kremer*, 456 U.S. at 466.

Instead of following the mandate of Section 1738, the Tenth Circuit absolutely ignored state law. The court made no reference to state law. It cited no Oklahoma cases.

The Tenth Circuit simply made the unsubstantiated statement that "the record does not reflect sufficient evidence that the Authority was given a full and fair opportunity to litigate [the Fair Housing Act] claim before the state court...." Yet, a reading of the complaint, and of every other document of record in this case, does not give even a hint that Kaw Housing Authority received anything but a full and fair opportunity to litigate before the state court. To the contrary, the entire record affirmatively shows that Kaw Housing Authority in fact received all the process that was its due in the Kay

County District Court. Indeed, although the court below cited *Montana v. United States*, 440 U.S. 147, 164 n.11 (1979), for the proposition that there was reason to doubt the fairness of the procedures followed in the prior state court litigation, it neither gave any substantiation for that statement nor paid any credence to this Court's statements in *Kremer* clarifying the meaning of that cited footnote.

This Court has stated:

> [W]here we are bound by the statutory directive of § 1738, state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law. It has long been established that § 1738 does not allow federal courts to employ their own rules of *res judicata* in determining the effect of state judgments. Rather, it goes beyond the common law and commands a federal court to accept the rules chosen by the State from which the judgment is taken.

Kremer, 456 U.S. at 481, 482. The Court further elaborated, stating that "what a full and fair opportunity to litigate entails is the procedural requirements of due process." 456 U.S. at 482 n. 24.

Stated simply, the Tenth Circuit did precisely what Section 1738 prohibits -- it substituted its own concept of *res judicata* for that of Oklahoma. This step it may not take. As one authority has written concerning another Tenth Circuit claims preclusion holding upon which the court below relied, "[t]he opinion seems a thinly veiled expression of dissatisfaction with the general rules announced by the Supreme Court." Wright, Miller & Cooper, *Federal Practice & Procedure* § 4471 n. 27.10 (referring to the holding in *Scroggins v. Kansas*, 802 F.2d 1289 (10th Cir. 1986)).

The complaint alleges that Ponca City sued Kaw Housing Authority in state court, seeking to permanently enjoin it from operating within the Ponca City city limits without Ponca City's permission. The complaint then alleges that the state court granted judgment in favor of

Ponca City, and thereby issued the requested permanent injunction. *See* appendix at page 44. Although the complaint does not so state, Kaw Housing Authority asserts that the state court judgment was somehow irregular, presumably because of the procedures, allowed by Rule 13, Rules for District Courts of Oklahoma, Okla. Stat. tit. 12, Ch. 2, App., that a state district court may grant summary judgment to the non-moving party. That is the only factor about the prior state court proceedings which might seem at all odd to a federal court.[3] Yet, the

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[3] In fact, it is difficult to tell whether the district court or the Tenth Circuit considered the voluminous record that Kaw Housing Authority and Ponca City submitted for consideration. Neither Judge Russell of the Western District of Oklahoma nor the Tenth Circuit indicated that the document had been excluded. *Cf.* Rule 12(b), Fed. R. Civ. Proc. (last sentence). Both the transcript of the district court proceedings and the Tenth Circuit opinion itself make it seem as if the courts did not exclude those additions to the complaint. On the other hand, both courts specifically considered the motion as one to dismiss. In any event, with or without the supplemental material, there is nothing in the record to suggest anything but that Kaw Housing Authority had a full and fair opportunity to litigate in Kay County District Court.

Oklahoma rules specifically make that procedure available, to all litigants, in all state court civil proceedings.

This Court has stated that "no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." *Kremer*, 456 U.S. at 483. Surely, when all parties have notice, through published rules, that a court has power to decide a motion for either party, the procedures comport with the Due Process Clause of the Fourteenth Amendment.

Inescapable is the conclusion that Oklahoma's "panoply of procedures, complemented by ... judicial review, is sufficient under the Due Process Clause." *Kremer*, 456 U.S. at 484. The fact that Kaw Housing Authority failed to avail itself of all of the procedures state law allows may demonstrate that Kaw Housing Authority made an unwise tactical decision; but it does not constitute a sign of the inadequacy of Oklahoma's procedures. 456 U.S. at 485.

A brief review of Oklahoma law demonstrates that

the Oklahoma state court judgment is entitled to preclusive effect in Oklahoma. *See Citizens State Bank of Hugo v. Hall*, 413 P.2d 513 (Okla. 1966) (prior judgment on the merits precludes relitigation of the same underlying claims, including all matters germane to issues which could or might have been litigated); *Kelley v. Kelley*, 447 P.2d 774 (Okla. 1968) (*res judicata* applies where facts determined in former case are the essential facts of subsequent action); *Banks v. City of Ardmore*, 188 Okla. 611, 112 P.2d 372 (1941) (*res judicata* applies against claims which could have been brought as counterclaims); *Aetna Insurance Co. v. Ralls*, 200 Okla. 32, 190 P.2d 787 (1948) (status as plaintiff or defendant in prior action does not preclude application of *res judicata*). The permanent injunction Kaw Housing Authority refers to in its own complaint is itself a final judgment. Okla. Stat. tit. 12, § 1381 (1981); *Morse v. Earnest, Inc.*, 547 P.2d 955 (Okla. 1976).

Kaw Housing Authority itself chose to file a motion for summary judgment and to dismiss, instead of filing a

counterclaim in the state court proceeding. *Cf.* Okla. Stat. tit. 12, § 2013 (counterclaims procedure). Kaw Housing Authority itself chose to take the risks attendant with filing a motion for summary judgment in Oklahoma, that the court had the power to render judgment even to the non-moving party. *See* Rule 13(e), Rules for District Courts of Oklahoma. Okla. Stat. tit. 12, Ch. 2, App.

A cursory comparison of the state court litigation and this case likewise demonstrates that, indeed, the cases involved precisely the same issue. The issue in both cases concerned the power of Kaw Housing Authority to operate within the city limits of Ponca City without the city's permission. If Kaw Housing Authority did not need Ponca City's permission, then there is no Article III actual case or controversy. Kaw Housing Authority could do what it says it wants to do, at any time. If, on the other hand, state law requires Kaw Housing Authority to obtain Ponca City's permission, as the complaint itself alleges, *see* appendix at pages 45-49, and as state law provides, then, quite clearly, *res judicata*

attaches. For that is precisely what the Kay County District Court judgment held.

The Tenth Circuit's order actually is a double barrelled attack on the powers of the State of Oklahoma within the American federal system. This Court has stated that "[d]epriving state judgments of finality ... would violate basic tenets of comity and federalism." *Kremer*, 456 U.S. at 478; *Maresse*, 470 U.S. at 380. Not only does the Tenth Circuit's judgment attack the credibility of an Oklahoma state court judgment, but it also adversely affects interests of federalism by calling into question the very statutory method by which Oklahoma called into being two of its own political subdivisions, the Kaw Housing Authority and the City of Ponca City.

As the state court judge ordered, Kaw Housing Authority must obtain Ponca City's permission in order to operate within Ponca City. Because Ponca City had not granted that permission, the judge enjoined Kaw Housing Authority from operating within the city limits. That order

reflects not only the considered judgment of a sitting state court judge, but also the very law of Oklahoma which created Kaw Housing Authority, Okla. Stat. tit. 63, §§ 1054, 1057, as Kaw Housing Authority itself specifically pleaded in its complaint. *See* appendix at pages 45-49. Certainly, this is an instance where "[t]he States unquestionably do 'retai[n] a significant measure of sovereign authority.'" *Garcia v. San Antonio Metropolitan Transit Auth.*, 469 U.S. 528, 549 (1985) (quoting *EEOC v. Wyoming*, 460 U.S. 226, 269 (1983) (Powell, J., dissenting)). Certainly, a state retains the right to regulate the relative powers of its various agencies and political subdivisions that it creates.

One commentator has described the process that a court is supposed to follow when determining the *res judicata* effect of a previous state court judgment.

> When a state court judgment is offered to establish preclusion in a federal 'civil rights' action, it is entitled to the res judicata effects described by state law. ***Section 1738 permits denial of res judicata for lack of a full***

> *and fair opportunity to litigate only if the state procedures fell below the requirements of due process*, or presumably if state courts would themselves adopt a wider full and fair opportunity limit.

Wright, Miller and Cooper, *Federal Practice and Procedure* §4471 (Supp. 1991) (emphasis added). That commentator provided further elucidation of the so-called "full and fair opportunity to litigate" exception:

> In cases controlled by § 1738, however, [the Court in *Kremer*] concluded that this exception permits federal courts to ignore a state judgment only if the state procedures violated due process.
>
> * * *
>
> Discrimination plaintiffs may seek ways to avoid the preclusion result of the Kremer case, but there are few promising paths to follow. The only clear release occurs if state courts themselves would not recognize preclusion.... It does not seem likely that any of these arguments will succeed often; at least most will not succeed at all.

* * *

> There is obviously room in the Court's opinion to defeat preclusion by showing that the state proceedings did not afford a full and fair opportunity to try the discrimination claim. The test applied to state proceedings, however, is the due process test.... [C]laimants should find little solace in the prospect that they can avoid preclusion by showing a denial of due process in state proceedings.

Id.

Although Kaw Housing Authority perhaps did not need to plead its case as specifically as it did, the complaint itself pleads with clarity that Kaw Housing Authority had the opportunity to litigate the issues it raises in this case in the district court of Kay County, Oklahoma. The complaint likewise demonstrates that the Kay County District Court entered a final judgment which operates to bar this claim in this case. The fact that Kaw Housing Authority made what it now considers to have been a mistake in its litigation tactics does not suffice to

limit the *res judicata* effect of the prior state court judgment. And the wholly unsubstantiated assertion by the court below that there was insufficient evidence to show that Kaw Housing Authority had a full and fair opportunity to litigate its Fair Housing Act claim, without any reference to Oklahoma law or the state court's procedures, is such a departure from the normal practice of all federal courts, as clearly delineated in the opinions of this Court, as to require this Court's supervision in this case.

POINT III:

Requiring a successful litigant to file a cross-appeal from a judgment dismissing all claims is in conflict with applicable decisions of this Court and is such a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Unprecedented is the assertion of the Court of Appeals that the City of Ponca City must have filed a cross-appeal in order to assert that the doctrine of *res*

judicata barred this claim. This court has stated, on numerous occasion, that "the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *Dandridge v. Williams*, 397 U.S. 471, 475, n. 5 (1970) (citations omitted). *See also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 n. 7 (1984); *Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 476 n. 20 (1979); *Massachusetts Mutual Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480-481 (1976). Where a party has absolutely succeeded on the merits in the trial court, as Ponca City did here, *see* Fed. R. Civ. P. 41(b), it is difficult to imagine how, or why, a party should ever cross-appeal.

Should a party who wins always file a cross-appeal? Surely such a requirement would further backlog the courts with unnecessary paper. Should the prevailing

party seek a new trial? Such an absurd result is precisely what the order of the Tenth Circuit would require.

When a party wins on the merits, the case ends. There is no reason to file an appeal to vindicate an alternative argument.

This is not a case where Ponca City is attempting to enlarge its rights beyond those already given it by the trial court. *Cf. Thigpen v. Roberts*, 468 U.S. 27 (1984). Ponca City does not seek, for example, to succeed on the merits of a count it lost. Instead, it is merely seeking affirmance of the district court's dismissal order, albeit on a different basis than the court below adopted. *Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982). Any order according *res judicata* effect to the prior state court judgment would conclude precisely as the trial court's judgment did: "Therefore, the motion to dismiss is hereby granted." *See* appendix at pages 56-57.

The Tenth Circuit's concern for "other potential plaintiffs having some relationship" with Kaw Housing Authority is nonsensical. The responsibility of a court is

to deal with the parties and the case before it. This litigation, like the prior state court proceeding, is between this petitioner and this respondent. This is not a case between John Doe and Jane Roe, but between Kaw Housing Authority and Ponca City. In any event, how the Tenth Circuit could possibly know the claims preclusive effect of this case on non-parties is mystifying, since that court never examined Oklahoma law, the controlling law.

The court's decision, whether on the basis of the Civil Rights Acts of 1866 and 1871, the Fair Housing Act or the doctrine of *res judicata*, will bind only the parties before it. Of course, a privy to a litigant may later be found to be bound by the same result. But the privy certainly has the opportunity to litigate for itself both its status as a privy and the preclusive effect of the prior determination. *See Montana v. United States*, 440 U.S. 147 (1979). Other parties who are not privies, in any event, always retain the right to seek to vindicate their own rights.

Ponca City could not have won a more complete

victory. Ponca City moved to dismiss the complaint. The trial court dismissed the complaint. Ponca City objected to a motion to set aside the dismissal. The trial court denied Kaw Housing Authority's motion. A more complete victory was not possible.

The point is this - Ponca City may assert the doctrine of *res judicata* to support the order of dismissal in this case without filing a cross-appeal. As previously stated in this petition, the doctrine of *res judicata* absolutely bars these claims. Ponca City, which obtained a judgment of dismissal, is entitled to defend that judgment without having to appeal or to cross-appeal. The Tenth Circuit's order is such a departure from the normal and customary conduct of judicial proceeding, and is in such conflict with decisions of other federal courts of appeals, that this court should issue a writ of certiorari to the Tenth Circuit in this case.

CONCLUSION

The Tenth Circuit so far departed from the accepted

and usual course of judicial proceedings in several respects as to call for an exercise of this Court's power of supervision. The court openly substituted its own concept of the reach of the Fair Housing Act for the plain words of Congress's enactment. That, in turn, resulted in a serious breach of customary norms of federalism. Similarly, the Tenth Circuit absolutely ignored the plain rulings of this Court in regard to practice under the Federal Full Faith and Credit Act, by paying absolutely no credence to Oklahoma's claims preclusion law. This, too, has had a serious impact on the federal system, by calling into question the finality and viability of state court judgments. Lastly, the Tenth Circuit created a new requirement that a party who is absolutely successful on the merits of the case must nevertheless appeal the trial court's decision in order to preserve an alternative basis for supporting the trial court's decision. Petitioner, City of Ponca City, therefore prays this Court, upon consideration of its argument, to grant it certiorari for review of these important issues, and to allow petitioner to file its brief

and articulate more fully the reasons that the Tenth Circuit's opinion should be reversed.

Respectfully submitted,

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No. 91-1480

Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1991

CITY OF PONCA CITY, a
Municipal Corporation,
Petitioner,

v.

HOUSING AUTHORITY OF THE KAW
TRIBE OF INDIANS OF OKLAHOMA,
Respondent.

PETITIONER'S APPENDIX TO PETITION FOR CERTIORARI

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PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

HOUSING AUTHORITY OF THE KAW TRIBE OF INDIANS OF OF OKLAHOMA,	)	
Plaintiff-Appellant,	)	
v.	)	No. 90-6154
CITY OF PONCA CITY, a municipal corporation,	)	
Defendant-Appellee.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA
(D.C. No. CIV-89-692-R)

Linda A. Epperley (Nathan H. Young III with her on the briefs), Tahlequah, Oklahoma, for Plaintiff-Appellant.

Andrew W. Lester (Laura Holmgren-Ganz with him on the briefs) of Lester, Bryant & Ganz, Enid, Oklahoma, for Defendant-Appellee.

Before McKAY, Chief Judge, HOLLOWAY, Circuit Judge, and WINDER,[1] District Judge.

McKAY, Chief Judge.

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[1] Honorable David K. Winder, United States District Judge for the District of Utah, sitting by designation.

The Housing Authority of the Kaw Tribe of Indians of Oklahoma (the "Kaw Housing Authority" or the "Authority") challenges the order of the United States District Court for the Western District of Oklahoma dismissing its action because it lacked standing to bring suit pursuant to 42 U.S.C. §§ 1981-1983 (1988) and Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601 et seq. (1988), better known as the Fair Housing Act. The action arose after a state court issued a permanent injunction prohibiting the Kaw Housing Authority from purchasing homes within the city's boundaries. This injunction came at the request of the city following a veto by the mayor of Ponca City of an Inter-local Cooperation Agreement between the city and the Kaw Housing Authority for the purchase of up to ten residences for the benefit of members of the Kaw Tribe of Oklahoma.

I.

To provide and maintain housing for the needy,

Congress enacted the Housing Act of 1937. 42 U.S.C. § 1437 (1988). Consistent with the Act's mandate, the Department of Housing and Urban Development ("HUD") has promulgated regulations for the creation of Indian housing authorities. See 24 C.F.R. §§ 905.101-905.950 (1990). The regulations provide that an Indian housing authority may be created by either a tribal ordinance or pursuant to state law. 24 C.F.R. §§ 125-26 (1991). Whether created by tribal ordinance or state statute, the administration of an Indian housing authority must adhere to certain rules promulgated by the federal government to qualify for available federal funds.

The State of Oklahoma enacted a statute providing for the establishment of local Indian housing authorities. Okla. Stat. tit. 63, § 1057 (1984).[2] The Oklahoma law

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[2] Okla. Stat. tit. 63, § 1057 (1984) provides:

> There is hereby created, with respect to each Indian tribe, band, or nation in the state, a public body corporate and politic, to function in the operating area of such Indian tribe, ban, or nation

grants an Indian housing authority most of the powers of any city or county housing authority in the state, including the power of eminent domain. Okla. Stat. tit. 63, § 1078 (1984). The state enactment specifically designates an Indian housing authority as a state agency. Id. at §

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to be known as the "housing authority" of said Indian tribe, band, or nation, which shall be an agency of the State of Oklahoma, possessing all powers, rights, and functions herein specified for city and county authorities created pursuant to this act: Provided that said Indian housing authority shall not transact any business nor exercise its powers hereunder until or unless the governing council of said tribe, band or nation, as the case may be, by proper resolution, declares that there is a need for an authority to function for said tribe, band, or nation.

Except as otherwise provided in this act, all the provisions of law applicable to housing authorities created for cities and counties and the commissioners of such authorities shall be applicable to Indian housing authorities and the commissioners thereof, unless a different meaning clearly appears from the context. The chief or other governing head of an Indian tribe, band, or nation is hereby authorized to exercise all appointment and other powers with respect to an Indian housing authority that are vested by this act in the mayor of a city relating to a city housing authority.

1057.

The Kaw Housing Authority was created pursuant to the Oklahoma enabling provision. With financial support from HUD, the Kaw Housing Authority operates to provide low- and moderate-income housing for members of the Kaw Tribe and other Native-Americans. In 1988, the Authority applied to HUD for additional funding for the purchase of existing homes for low-income Kaw tribal members at scattered sites in Kay County, Oklahoma. As part of the scattered site acquisition project, the Kaw Housing Authority wished to purchase ten homes in Ponca City. Because Oklahoma law precludes a housing authority from operating in an area in which another housing authority is already operating, or within the boundary of a city unless the city has adopted a resolution of consent, see Okla. Stat. tit 63, § 1054(f), the Kaw Housing Authority sought permission from Ponca City to purchase property within its boundaries. On December 19, 1988, the Ponca City Council approved an

Inter-local Cooperative Agreement supporting the purchase by the Authority of ten homes within the city limits. Pursuant to the agreement, the Authority executed options on seven homes and paid deposits totalling $14,000. On December 21, 1988, however, the mayor vetoed the cooperative agreement, voicing concerns that the homes might become "Indian lands" and therefore immune from the city's jurisdiction. The city council approved the veto on January 6, 1989. The city then filed an action in state court prohibiting the Kaw Housing Authority from purchasing land within the city. The state court issued such an injunction on April 3, 1989.

The Kaw Housing Authority brought suit in federal district court, alleging that the city's actions were racially motivated and thereby violated the Authority's constitutional rights guaranteed by sections 1981-1983 of the Civil Rights Act. The Authority also claimed that the city had violated the Fair Housing Act.

In response, the city filed a Rule 12(b)(6) motion to dismiss. It asserted that, as a political subdivision of the State of Oklahoma, the Authority possessed no federal constitutional rights which could be enforced against another political subdivision under sections 1981-1983. The motion also alleged that the Authority did not qualify as an "aggrieved person" under the Fair Housing Act. Finally, the city argued that the authority was barred from asserting these claims by the doctrine of res judicata because the claims could have been asserted in response to the city's action in state court. The district court granted the city's motion to dismiss, concluding that the Kaw Housing Authority did not have standing to sue under sections 1981-1983 or the Fair Housing Act. However, the court expressly stated that res judicata was not a basis for its decision.

The Authority now brings this appeal. We review a Rule 12(b)(6) dismissal for failure to state a claim under the same standard applied by the district court. We

therefore must assume as true all well-pleaded facts, construing them in favor of the non-moving party. Warth v. Seldin, 422 U.S. 490, 501 (1975); Bryan v. Stillwater Bd. of Realtors, 578 F.2d 1319, 1321 (10th Cir. 1977).

The Authority challenges the district court's conclusion that it does not have standing to bring suit under 42 U.S.C. §§ 1981-1983. It also argues that the trial court erred when it held that the Authority was not an "aggrieved person" for purposes of bringing suit under the Fair Housing Act. Conversely, the city complains that, even if the Authority has standing to sue under these provisions, the causes of action brought in the district court are barred by principles of res judicata stemming from the city's action seeking an injunction against the Authority in state court. We address, in turn, each of the parties' claims.

II.

The focus of any inquiry into standing "is whether

the litigant is entitled to have the court decide the merits of the dispute or of particular issues. This inquiry involves both constitutional limitations on federal-court jurisdiction and prudential limitations on its exercise. . . . In both dimensions it is founded in concern about the proper--and properly limited--role of the courts in a democratic society." Warth v. Seldin, 422 U.S. 490, 498 (1975) (citations omitted). The constitutional limitations of standing are derived from Article III, which limits judicial power to "cases" and "controversies." To overcome the Article III limitation on standing, often referred to as the "injury in fact" requirement, a plaintiff must at a minimum show that he or she has suffered an actual or threatened injury caused by the defendant and that a favorable judicial decision is likely to redress the injury. Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 471 (1982).

Beyond the constitutional requirements, the Supreme Court has - also set forth principles of standing

that limit the class of persons that may invoke the courts' powers. See Secretary of State v. Joseph H. Munson Co., 467 U.S. 947, 955 (1984); Valley Forge Christian College, 454 U.S. at 474-75; accord Acorn v. City of Tulsa, 835 F.2d 735, 738 (10th Cir. 1987). For example, one significant limitation is that a party must assert its own legal rights and cannot rest its claim on the interests of others. Warth, 422 U.S. at 499. "Without such limitations . . . the courts would be called upon to decide abstract questions of wide public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights." Id. at 500. Consequently, even though the plaintiff has suffered palpable injury because some third party has been denied legal rights, the plaintiff may not generally assert the third party's rights as the basis of its claim.

A.

We focus initially on the Authority's standing to sue

under section 1983.[3] That provision was enacted to vindicate rights guaranteed under the Fourteenth Amendment, see Jones v. Alfred H. Mayer Co., 392 U.S. 409, 436 (1968); City of Memphis v. Greene, 451 U.S. 100, 120 (1981), which places limitations on the states in the interest of individual rights. See Commonwealth of Pennsylvania v. Porter, 659 F.2d 306, 314 (3rd Cir. 1981) (en banc), cert. denied, 458 U.S. 1121 (1982). To have standing to sue under section 1983, therefore, the Authority must possess some right guaranteed by the

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[3] Section 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1988).

Fourteenth Amendment. Thus, section 1983 does not provide any substantive rights at all but only creates a remedy for the violation of substantive rights guaranteed by the Constitution. Chapman v. Houston Welfare Rights Org., 441 U.S. 600, 617-18 (1979).

To determine whether the Kaw Housing Authority possesses a Fourteenth Amendment right, we must first review the Authority's origin. The Oklahoma enabling statute provides that an Indian Housing Authority organized under its provisions is a state agency. Moreover, HUD, the federal agency in charge of overseeing Indian housing authorities, recognizes that Indian housing authorities have state agency status. In its regulations, HUD applies the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 to those Indian housing authorities created by state statute, see 24 C.F.R. § 905.120 (1990), but does not confer those same benefits on Indian housing authorities established by operation of tribal powers of

self-government independent of state law because those housing authorities are not considered "state agencies." That the Kaw Housing Authority is a body politic of the State of Oklahoma under both federal and state law, therefore, is beyond review.[4]

It is well established that a political subdivision may not lodge constitutional complaints against its creating state. Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40 (1933); City of Newark v. New Jersey, 262 U.S. 192, 196 (1923); City of Trenton v. New Jersey, 262 U.S. 182, 188 (1923); City of Moore v. Atchison, Topeka & Santa Fe Ry. Co., 699 F.2d 507, 511 (10th Cir. 1983). The city urges us to apply this same principle to a constitutional challenge brought by a political subdivision, the Kaw Housing Authority, against

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[4] The Oklahoma Housing Authority Act defines an "Authority," of which the Kaw Housing Authority is one, as "any public body corporate and politic created by this act." Okla. Stat. tit. 63, § 1054 (1984).

a fellow political subdivision, Ponca City, contending that such a challenge is tantamount to an action against the creating state.

In City of Trenton v. New Jersey, 262 U.S. at 188, the Supreme Court heard a challenge of a state statute by a municipality under the Contracts Clause of the Constitution. In concluding that the municipality could not mount a constitutional challenge against a state provision regulating its conduct, the Court cited with favor Mr. Justice Moody's opinion in Hunter v. Pittsburgh, 207 U.S. 161, 178-79 (1907), overruled on other grounds by Kramer v. Union Free Sch. Dist. 2, 395 U.S. 621 (1969), which stated:

> The number, nature and duration of the powers conferred upon these corporations and the territory over which they shall be exercised rests in the absolute discretion of the state. Neither their charters, nor any law conferring governmental powers, or vesting in them property to be used for governmental purposes, or authorizing them to hold or manage such property, or exempting them from taxation upon it, constitutes a contract with the state within

> the meaning of the Federal Constitution. The state, therefore, at its pleasure may modify or withdraw all such powers, may take without compensation such property, hold it itself, or vest it in other agencies, expand or contract the territorial area, unite the whole or a part of it with another municipality, repeal the charter and destroy the corporation. All this may be done, conditionally or unconditionally, with or without the consent of the citizens, or even against their protest. In all these respects the state is supreme, and its legislative body, conforming its action to the state Constitution, may do as it will, unrestrained by any provision of the Constitution of the United States. . . . The power is in the state, and those who legislate for the state are alone responsible for any unjust or oppressive exercise of it.

City of Trenton, 262 U.S. at 186-87. The Court then listed a long line of precedent establishing that a municipality, as a department of the state, "remains the creature of the State exercising and holding powers and privileges subject to the sovereign will." Id. at 187.

In one such case, City of Pawhuska v. Pawhuska Oil & Gas Co., 250 U.S. 394 (1918), the Court addressed whether a state could properly withdraw a city's authority

to establish municipal gas rates and transfer that power to a state commission. In concluding that the parties had not set forth a question that could be redressed under the Contracts Clause of the Constitution, the Court stated:

> Thus the whole controversy is as to which of two existing agencies or arms of the state government is authorized for the time being to exercise in the public interest a particular power, obviously governmental, subject to which the franchise confessedly was granted. In this no question under the contract clause of the Constitution of the United States is involved, but only a question of local law, the decision of which by the supreme court of the state is final.

Id. at 397.[5] Precisely the same struggle over which arm

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[5] See also Williams v. Mayor and City Council of Baltimore, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."); Risty v. Chicago, Rock Island & Pacific Ry. Co., 270 U.S. 378, 390 (1926) ("The power of the State and its agencies over municipal corporations within its territory is not restrained by the provisions of the Fourteenth Amendment."); City of Newark v. New Jersey, 262 U.S. 192, 196 (1923) ("The City cannot invoke the protection of the Fourteenth Amendment against the State. Considering the former opinions of this Court, there

of the state may act in the public interest is at issue here.

Simply because we are now faced with a challenge brought by a state agency against a municipality rather than a challenge by a municipality against an arm of the state or a state statute does not warrant a different outcome. The Authority's challenge of the city's action is, if only indirectly, a challenge to the legislature's grant of authority to the city to determine whether a housing authority may operate within its boundaries. It is this grant of authority by the state legislature that allowed the city to both prohibit the Kaw Housing Authority from carrying

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is no substantial federal question in the case.") (footnote omitted); City of New Orleans v. New Orleans Water Works Co., 142 U.S. 79, 89 (1891) ("[T]he city being a municipal corporation and the creature of the state Legislature, does not stand in a position to claim the benefit of the constitutional provision in question, since its charter can be amended, changed, or even abolished at the will of the Legislature."); City of Moore v. Atchison, Topeka, & Santa Fe Ry. Co., 699 F.2d 507, 511-12 (10th Cir. 1983) ("[Political subdivisions of a state lack standing to challenge the validity of a state statute on Fourteenth Amendment grounds.").

out its contracts for the purchase of seven homes within its boundaries and to obtain a permanent injunction prohibiting the Authority from purchasing any other home in the city. Since the city complied with the state legislature's prescription, its actions are sanctioned by the legislature. The Authority, as a state agency, cannot therefore void the city's actions based on an assertion of a constitutional right inherent in the agency. See Akron Bd. of Educ. v. State Bd. of Educ., 490 F.2d 1285, 1298 (6th Cir. 1974) (Weick, J., dissenting), cert. denied, 417 U.S. 932 (1974); accord City of South Lake Tahoe v. California Tahoe Regional Planning Agency, 625 F.2d 231, 233 (9th Cir. 1980). See also Village of Arlington Heights v. Regional Transp. Auth., 653 F.2d 1149, 1153 (10th Cir. 1981). We thus conclude that a political subdivision of a state may not challenge the validity of an act by a fellow political subdivision under the Fourteenth Amendment unless such an action is expressly authorized by the creating state.

The city argues that because we must look at whether a political subdivision is carrying out a state or local function to determine generally whether a suit may be brought against it under section 1983, see Garcia v. Board of Education of Soccorro Consolidated School District, 777 F.2d 1403, 1407 (10th Cir. 1985), cert. denied, 479 U.S. 814 (1986), we must also look at whether that same political subdivision is an "alter ego" of the state to establish whether another political subdivision may bring suit against it. As precedent for this argument, the city cites Monell v. Department of Social Servs. of New York, 436 U.S. 658 (1977), which held that local governmental bodies are "persons" for purposes of liability under section 1983.

We believe the city misinterprets the Supreme Court's holding in Monell. There, the Court simply held that Congress, when enacting section 1983, wished to bring local governments within the statute's ambit of liability. In Owen v. City of Independence, 445 U.S. 622,

646 (1980), "the Supreme Court observed that "by the end of the 19th century, courts regularly held that in imposing a specific duty on the municipality either in its charter or by statute, the State had impliedly withdrawn the city's immunity from liability for the nonperformance or misperformance of its obligations." Because at the time of the enactment of section 1983 municipalities no longer shared sovereign immunity with their creating states, an agency carrying out a local function could be held liable under section 1983 without intruding on the doctrine of state immunity. Accord Will v. Michigan Dep't. of State Police, 109 S. Ct. 2304, 2310 n.7 (1989). That an agency carrying out a state function rather than a local function is immune from section 1983 liability, however, is a consequence of the breadth of Eleventh Amendment coverage rather than the independence of a political subdivision from its creating state. The bifurcation between local and state functions, while important for purposes of assessing Eleventh Amendment immunity, provides no comfort to the Authority in

asserting its ability to bring suit against a municipality. Cf. Appling County v. Municipal Elec. Auth., 621 F.2d 1301, 1308 (1980), cert. denied, 449 U.S. 1015 (1980) ("The Monell decision does not call into question the principle that a city or county cannot challenge a state statute on federal Constitutional grounds.").[6]

The Kaw Housing Authority next urges that, as a tribal organization as well as a political subdivision of the state, it possesses rights protected by the civil rights laws. It cites authority holding that a corporation or other form of business or non-profit organization may bring an action under section 1983. See, e.g., Allee v. Medrano,

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[6] We acknowledge those cases that prevented suit by a municipality under section 1983 using the rationale of Monroe v. Pape, 365 U.S. 167 (1961), which was later overruled by Monell. Under those cases, a city was prevented from bringing suit as a person because it could not conversely be liable under section 1983 as a person. See, e.g., City of Safety Harbor v. Birchfield, 529 F.2d 1251, 1255 (5th Cir. 1976). Our rationale, however, does not rely on such a premise.

416 U.S. 802, 819 n.13 (1974). The Authority focuses on this court's decision in United States v. Crossland, 642 P.2d 1113 (10th Cir. 1981), where we quoted with approval the following assessment of the Kiowa Housing Authority, organized under the same state provision, from Ware v. Richardson, 347 F. Supp. 344, 347 (W.D. Okla. 1972):

> In legal consequence, however, it operates as an arm of the Kiowa Tribe of Indians for it is completely controlled by them through their power of appointment. While it is nominally a state agency, it is statutorily freed of state control and subjected to the unfettered control of the Tribe.

Crossland, 642 F.2d at 1114.[7] In Crossland, we held

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[7] The Oklahoma Supreme Court, when faced with an identical issue as the court in Ware, reached an opposite result. See Housing Auth. of the Choctaw Nation v. Crayter, 600 P.2d 314 (Okla. 1979). At issue in Crayter was a challenge by two factions which each claimed to be the rightful commissioners of the Choctaw Nation Housing Authority. The state's highest court found the dispute to be a state, rather than a tribal, issue. The court concluded: "District Courts do have jurisdiction over the Housing Authorities, for the Authority became a public body, both corporate and politic, by virtue of the Oklahoma Housing

that a defendant who embezzled from an Indian housing authority organized under the same Oklahoma provision as the Kaw Housing Authority was properly convicted of embezzlement and theft from an Indian tribal organization pursuant to 18 U.S.C. § 1163. We relied on the reasoning of United States v. Logan, 641 F.2d 860 (10th Cir. 1981), which held that incorporation under state law did not preclude a for-profit entity organized under the guidelines of the Indian Financing Act and wholly owned by a tribe from being characterized as an Indian tribal organization. We asserted in Logan that Oklahoma law and the Indian Financing Act were not "mutually exclusive; a corporation may be organized under both." Id. at 862. We applied a similar rationale in Crossland to an Indian Housing Authority, despite its character as a

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Authority Act and by virtue of the Choctaw Nation's voluntary choosing to have a functioning Authority under the Act." Id. at 316.

state agency.[8]

Though a distinction between a private entity incorporated under state law and an agency established by the state and subsequently divested of state power

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[8] The Authority attempts to bolster its argument by referencing the decisions in Aboah v. Housing Auth. of the Kiowa Tribe, 660 P.2d 625 (Okla. 1983), and Housing Auth. of the Seminole Nation v. Harjo, 790 P.2d 1098 (Okla. 1990), which found that actions brought by Indian housing authorities organized under the Oklahoma Housing Authorities Act could not bring suit for forcible entry and detainer in state court. These cases are unavailing, however, for purposes of our analysis. The absence of state jurisdiction was based not on the housing authorities' status as a tribal organization but because the land at issue was "Indian land" over which the state court had no adjudicatory jurisdiction. Admittedly, the court in Harjo emphasized the supervision of the federal government in a contract administered by an Indian Housing Authority. It nevertheless focused on the Mutual Help and Occupancy Agreement which a housing authority must enter into before it may participate in a program administered by HUD. That decision also made clear that the property in question was subject to the superintendence of the government. In turn, this federal superintendence aided the court's ultimate conclusion that the land at issue was "Indian land." However, the court never relied on a characterization of the status of the Indian housing authority as a tribal organization independent of state law.

was not determinative for purposes of liability under 18 U.S.C. § 1163 in Logan and Crossland, we find the distinction dispositive for purposes of analyzing an entity's standing to protect its federal constitutional rights from encroachment by a political subdivision. As early as its decision in Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518 (1819), the Supreme Court has recognized that corporations for public government and for private purposes stand in differing positions to challenge action by the state. In Woodward, the Court held that the Constitution does not restrain the states in the regulation of their civil institutions adopted for internal government. The Court concluded, therefore, that state legislatures have power to enlarge, repeal and limit the authorities of public officers.[9] The decision's rationale

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[9] Chief Justice Marshall wrote:

> If the act of incorporation be a grant of political power, if it create a civil institution to be employed in the administration of the government, or if the funds of the college be public property, or if the state of New Hampshire, as a government, be alone interested in its transactions, the subject is one in

was premised on the same reasoning we use today: Since political subdivisions are creatures of the state, they possess no rights independent of those expressly provided to them by the state. Hence, unless expressly granted the ability by its creating state, a political subdivision cannot assert federal constitutional rights in opposition to state action.

State law grants to the Kaw Tribe the authority to establish and administer the Kaw Housing Authority. This grant nonetheless is subject to limitation or extinction. Pursuant to the Oklahoma Housing Authorities Act, the Kaw Housing Authority is "an agency of the State of Oklahoma, possessing all powers, rights, and functions herein specified for city and county [housing] authorities

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which the legislature of the state may act according to its own judgment, unrestrained by any limitation of its power imposed by the constitution of the United States.

Trustees of Dartmouth College, 17 U.S. at 629-30.

created pursuant to this act." Okla. Stat. tit. 63, § 1057. We see no reason to imply that the state conveyed to chiefs of Indian tribes any special rights that were not conveyed to mayors or county commissioners. We therefore do not find that included within the state's grant of authority to an Indian housing authority is the ability to lodge a federal constitutional challenge to actions of the state or its other political subdivisions. Whether the Kaw Housing Authority may complete its purchases without regard to Ponca City's desires is an issue of state law which does not, of itself, confer standing upon the Authority to pursue a federal claim.

B.

Though our analysis has to this point focused on the ability of the Authority to lodge a constitutional complaint against the city under section 1983, we believe a similar result is dictated for those actions brought under

sections 1981[10] and 1982.[11] Originally, sections 1981 and 1982 codified rights granted under the Thirteenth Amendment. Because of their recodification in 1870 along with the enactment of section 1983, however, courts have recognized that those rights guaranteed under these provisions are also guaranteed under the Fourteenth Amendment when state action is involved. Jett v. Dallas Indep. Sch. Dist., 491 U.S. 701, 722 (1989); Jones v.

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[10] All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

42 U.S.C. § 1981 (1988).

[11] All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1982 (1988).

Alfred H. Mayer Co., 392 U.S. 409, 436-37 (1968); see also City of Memphis v. Greene, 451 U.S. 100, 120 (1981) (recognizing that section 1982, which covers private parties, applies beyond Fourteenth Amendment prohibition which reaches only official action). Because the dispute before us is a result of official action, we believe that, like its claim under section 1983, the Authority possesses no legitimate claim against the state under sections 1981 or 1982 that would confer standing on the Authority. The Authority presents no argument for analyzing these claims differently.

C.

Despite its failure to demonstrate a federal constitutional right on which it can base a claim against another political subdivision of the State of Oklahoma, the Kaw Housing Authority nevertheless attempts to assert the rights of its participants as the basis of its action under the Civil Rights Act. See Sierra Club v. Morton, 405 U.S. 727, 739 (1972). Because of its status as a body

politic, we believe that the Authority's assertion of representational standing is better understood as a parens patriae action. See, e.g., Pennsylvania v. Porter, 659 F.2d 306, 314-17 (3rd Cir. 1981), cert. denied, 458 U.S. 1121 (1982). Yet the Authority presents no authorization by the State of Oklahoma to represent the state's sovereign interests. The Authority, under Oklahoma law, cannot therefore sue in a representative capacity. See Board of Educ., Sch. Dist. Number 150 v. Illinois State Bd. of Educ., 810 F.2d 707, 709-10 (7th Cir.), cert. denied, 484 U.S. 826 (1987) (a political subdivision's capacity to sue is determined by state law).

III.

We next turn to the district court's conclusion that the Authority could not maintain an action under the Fair Housing Act. Section 3613 of the Fair Housing Act provides a civil cause of action for an aggrieved person within two years of the occurrence or termination of an alleged discriminatory housing practice. 42 U.S.C. §

3613(a)(1)(A) (1991 Supp.).[12]

We note initially that the Authority's inability to properly assert a right under the Fourteenth Amendment is not of concern when examining the Authority's claims brought pursuant to the Fair Housing Act. In Gladstone, Realtors v. Village of Bellwood, 441 U.S. 91 (1979), and Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972), the Supreme Court held that standing under the Fair Housing Act extends "to the broadest class of plaintiffs permitt... by Art[icle] III." Gladstone, 441 U.S. at 96-97 (citing Trafficante). Consistent with the analysis

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[12] The section, amended in 1988, provides:

> An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

42 U.S.C. § 3613 (1991 Supp.).

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of these two Supreme Court cases, therefore, the rules of standing that barred the Authority's ability to bring suit pursuant to sections 1981-1983, are not involved here. If the Authority can demonstrate that it was genuinely injured by conduct that violated its rights under section 3604 of the Fair Housing Act, then the Authority is entitled to seek redress of that harm under section 3613. See Gladstone, 441 U.S. at 103 n.9. We believe that the Authority's economic injury from the loss of its deposits on seven homes within the city's boundaries is sufficient to confer Article III standing on the Authority. See Barlow v. Collins, 397 U.S. 159, 162-64 (1970).

Our inquiry concerning the Authority's standing to sue does not end with the finding that the Authority is not required to demonstrate that it possesses the legal rights protected by section 3604 of the Fair Housing Act. Both Gladstone and Trafficante focused on whether the plaintiff was "aggrieved" under the requirement that only an "aggrieved person" has standing to bring suit under the

Act. As appellee in the instant case, the city has focused on whether the Authority is a "person" for purposes of demonstrating that it is an "aggrieved person" under the Act.

The Act defines an aggrieved person as any "person" who has been or believes he or she will be injured by a discriminatory housing practice. 42 U.S.C. § 3602(i) (1991 Supp.). The Act further defines "person" as

> one or more individuals, corporations, partnerships, associations, labor organizations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 of the United States Code, receivera, and fiduciaries.

42 U.S.C. § 3602(d) (1991 Supp.).

The city maintains that, as a state agency, the Authority is not a "person" for purposes of maintaining an action under the Act. It refers to the definition of "person" under Title VII of the Civil Rights Act of 1964, which includes governments, governmental agencies and

political subdivisions.[13] Because those entities are absent from the definition of person in Title VIII of the Civil Rights Act of 1968, the city reasons that such entities do not have standing to bring suit pursuant to that provision.[14] This reasoning does not, however, explain

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[13] The definition reads in full:

> The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under Title 11 or receivers.

42 U.S.C. § 2000(e) (1988).

[14] In Gladstone, the group of plaintiffs bringing suit under the Act included a municipality. The Supreme Court, however, specifically declined to address whether a municipality is a "person" for the purpose of bringing suit under the Act:

> In this Court, petitioners have not argued that the village is not a "person," contending instead that it is not a "private person." Petitioners thus have presented a variant of the question raised belatedly in the Court of Appeals and given, perhaps deservedly, only cursory treatment there. Under these circumstances, the question whether

why Congress would wish to exclude governmental entities from bringing suit under the Fair Housing Act. The city appears to posit the following syllogism: 1) governmental agencies do not have standing to bring suit under the Fair Housing Act; 2) the Authority is a governmental agency; therefore, 3) the Authority does not have standing to bring suit under the Fair Housing Act.

The Authority contends that, regardless of its status as a state agency, it may bring an action under the Fair Housing Act as a public "corporation," a tribal "organization," and a "trustee" of the Kaw Tribe. It urges that even if we were to read the statute to exclude government agencies, we should not exclude those agencies with such special status.

Bellwood is a "private person" entitled to sue under § 812 is not properly before us, and we express no views on it.

Gladstone, 441 U.S. at 109 n.21.

We begin with the city's premise that governmental agencies do not have standing to bring suit under the Fair Housing Act. Though the decisions in Trafficante and Gladstone focused primarily on who was an "aggrieved person" under the Act, they also provide some assistance in determining who is a "person" under the Act. As the Court in Trafficante recognized, "the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered." Trafficante, 409 U.S. at 210. Noting that HUD had no enforcement powers under the Act, the Court reasoned that complainants bringing suit act as private attorneys general for those whose rights have been violated.

The Fair Housing Act was amended in 1988 to confer on HUD certain enforcement powers. See 42 U.S.C. § 3612 (1991 Supp.).[15] The legislative history

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[15] For an overview of the 1988 amendments, see Secretary, United States Dep't of Hous. &

of the 1988 amendments evidences the legislature's intent that the term "aggrieved person" should be given the broad definition recognized by prior precedent. H.R. Rep. No. 100-711, 100th Cong., 2d sess., reprinted in 1988 U.S. Code Cong. & Admin. News 2173, 2184.

Indeed, comments on proposed regulations consistent with the 1988 amendments addressed concerns that the definition of "aggrieved person" be expanded to include organizations such as housing authorities. HUD responded that

> the Department has determined that the definitions in these regulations which are terms defined in the Fair Housing Act should contain the statutory language. However, the Department has consistently interpreted the provisions of the fair housing law to permit the filing of a complaint by any person or organization which alleges that a discriminatory housing practice has occurred or is about to occur and which will result in an injury to them.

54 F.R. 3232-01. When faced with a problem of

Urban Dev. ex rel. Herron v. Blackwell, 908 F.2d 864, 868-70 (11th Cir. 1990).

statutory construction, an interpretation by the agency in charge of enforcing the statute is accorded great deference. See Udall v. Tallman, 380 U.S. 1, 16 (1965).

We believe that the interpretation of "person" urged by the city would substantially thwart the goal of Congress when it enacted the Fair Housing Act. The House Report on the 1988 amendments recognized the current procedure of referring a complaint to certified state or local agencies for disposition under section 3610 of the Act. See 42 U.S.C. § 3610(c) (1984). In particular, it "recognize[d] the valuable role state and local agencies play in the enforcement process." 1988 U.S. Code Cong. & Admin. News at 2196. Yet the interpretation urged by the city would exempt state and local agencies from bringing a civil action under the Act and thereby completely exclude from the Act's protection those agencies not "certified" by HUD. Such an action is particularly important where, as alleged in the Authority's complaint, a municipality's racial animus precludes a state

housing authority from carrying out its very function.[16]

We thus do not share the city's belief that by not specifically including within the definition of "person" the terms "governments, governmental agencies and political subdivisions" Congress meant to exclude those entities from filing suit under 42 U.S.C. § 3613. It is clear that

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[16] Though not cited by the city, we are somewhat troubled by the House Report's explanation that Section 8 of the Bill "amends title VIII by striking the provisions relating to enforcement in existing title VIII and replacing them with an administrative enforcement procedure and an improved system for civil action by private parties and the Attorney General." 1988 U.S. Code Cong. & Admin. News at 2194 (emphasis supplied). The analysis of the Seventh Circuit in Village of Bellwood v. Gladstone Realtors, 569 F.2d 1013, 1020 n.8 (7th Cir. 1978), referred to by the Supreme Court on review, see supra n.13, which recognized that a municipality was a "person" under the Fair Housing Act provides some solace. Aware of that holding, Congress did nothing to undermine the decision by amendment. Though the Seventh Circuit's reasoning is not definitive, given the broad sweep and increased enforcement contained in the Fair Housing Amendments Act of 1988, we are satisfied that Congress intended the result we reach here.

Congress intended to summon all available forces to "vindicat[e] a policy that Congress considered to be of the highest priority." Trafficante, 409 U.S. at 211.

The district court erred when it found that the Authority could not bring suit as a "person" under the Fair Housing Act. We now proceed to consider another theory proposed by the city as a basis for the dismissal of this allegation.

IV.

In addition to its other arguments, the city also contends that principles of res judicata bar the Authority's action brought pursuant to the Fair Housing Act. We note that the city lost this claim at the district court and did not cross-appeal. The city nevertheless argues that because it asserted the argument in the district court and a finding in its favor would sustain the district court's judgment, it was not required to cross-appeal. See Colautti v. Franklin, 439 U.S. 379, 397 n.16 (1979).

We are not persuaded by the city's contention. An appellee may present an argument on appeal only if it does not enlarge the rights conferred by the original judgment. Morley v. Maryland Casualty Co., 300 U.S. 185, 191 (1937); Person v. Labor Investment Corp., 284 F.2d 946, 948 (10th Cir. 1960). See also, 15 Charles Wright et al., Federal Practice and Procedure § 3905 (1990 Supp.). Were we to affirm the original judgment on the basis of res judicata, other potential plaintiffs having some relationship with the Authority might unfairly be precluded from bringing claims against Ponca City. Montana v. United States, 440 U.S. 147, 153 (1979).

A decision based on res judicata would also be unfair to the Authority. Litigants are entitled to a full and fair opportunity to litigate claims. Thournir v. Meyer, 803 F.2d 1093, 1095 (10th Cir. 1986); Scroggins v. Kansas, 802 F.2d 1289, 1291 (10th Cir. 1986). The City argues that the Authority should have been required to raise all claims before the state court that granted the permanent

injunction against the Authority. However, because the record provides no indication that the Authority was given a full and fair opportunity to litigate its claims before the state court, we refuse to affirm a decision to dismiss based on res judicata grounds. See Carter v. City of Emporia, Kansas, 815 F.2d 617, 621 (10th Cir. 1987) ("Even when the requirements of claim preclusion . . . are satisfied, we will still inquire whether plaintiffs have had a full and fair opportunity to litigate their claims before a court with the authority to adjudicate the merits of those claims.") (citations omitted); Morgan v. City of Rawlins, 792 F.2d 975, 979 (10th Cir. 1986) ("[I]f there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation, redetermination of the issues is warranted.") (citing Montana v. United States, 440 U.S. at 164 n.11) (other citations omitted).

The Authority's claim under the Fair Housing Act is not barred by res judicata because the record does not reflect sufficient evidence that the Authority was given a

full and fair opportunity to litigate that claim before the state court, and because the city failed to cross-appeal on this issue.

Conclusion

We affirm the decision of the district court to dismiss the Authority's claims brought under sections 1981-1983. We reverse the district court's decision to dismiss the Authority's claims brought pursuant to the Fair Housing Act and remand for consideration of those claims. We further hold that res judicata does not bar the Fair Housing Act claim.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE HOUSING AUTHORITY OF THE KAW TRIBE OF INDIANS OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	No.CIV-89-692-R
THE CITY OF PONCA CITY, a Municipal Corporation,	)	
Defendant.	)	

COMPLAINT

COMES NOW the plaintiff and for its cause of action against the defendant, alleges and states as follows:

PARTIES AND JURISDICTION

1. The plaintiff, the Housing Authority of the Kaw Tribe of Indians of Oklahoma ("Kaw Housing Authority"), is organized under the provisions of 63 O.S. §1051, et seq., for the benefit of the Kaw Tribe of Indians of Oklahoma to provide low and moderate income housing for the members of the Kaw Tribe of Indians and other

Indian tribal members, as provided under federal guidelines, with monies obtained by loan or grant from the Department of Housing and Urban Development ("HUD").

2. The defendant, the City of Ponca City ("Ponca City"), is a municipal corporation located within Kay County, Oklahoma.

3. All of the acts alleged herein occurred within the confines of the Western District of the State of Oklahoma in Kay County, Oklahoma; thus venue is proper pursuant to 28 U.S.C. §1391(b).

4. This is an action to redress the violation of the plaintiff's rights granted under the provisions of 42 U.S.C. §§1981, 1982, 1983 (Civil Rights Act), 42 U.S.C. §3601, et seq. (Fair Housing Act), and the United States Constitution. Jurisdiction before this Court is conferred under 28 U.S.C. §1343, 28 U.S.C. §1331, and 42 U.S.C. §3613 (Fair Housing Act violations).

GENERAL ALLEGATIONS

1. With monies obtained from the Department of Housing and Urban Development, the Kaw Housing

Authority has operated within Kay County, Oklahoma, providing low income and moderate income housing for members of the Kaw Tribe of Indians and other Indian tribes. In 1988, the Kaw Housing Authority made application to HUD for additional funding to purchase existing homes for low income Kaw tribal members at scattered sites in Kay County, Oklahoma (Newkirk, Blackwell and Ponca City).

2. On December 1, 1988, the Kaw Housing Authority wrote to the City Manager of Ponca City seeking the City's approval to purchase up to ten existing residences within the city limits of Ponca City as low income housing for Indians who are members of the Kaw Tribe. On December 19, 1988, representatives of the Kaw Housing Authority met with the Mayor and City Council at a regularly scheduled meeting of the City Council to discuss the proposed housing project and the execution of an Inter-local Cooperation Agreement between the City of Ponca City and the Kaw Housing Authority. The City Council objected to the execution of

the Agreement if the residences purchased by the Kaw Housing Authority would be "Indian lands" (therefore, removed from police power jurisdiction of Ponca City). When assured that the lands would remain under the jurisdiction of Ponca City, the City Council, by resolution, approved the Inter-local Cooperation Agreement and consented to the purchase of up to ten residences for the benefit of members of the Kaw Tribe of Oklahoma.

3. Relying upon the vote approving the Inter-local Cooperation Agreement, the Kaw Housing Authority thereafter executed options to purchase seven residences in Ponca city, Oklahoma, and paid good faith escrow deposits in the total amount of $14,000.00 as required by the terms of the option agreements.

4. On December 21, 1988, after recommendations from the City Manager, the Mayor of Ponca City vetoed the resolution for the reason that the residences might become Indian lands (being immune from jurisdiction of the City of Ponca City). On January 6, 1989, the City Council again met at a regularly scheduled

commission meeting with representatives of the Kaw Housing Authority and officials of HUD to discuss whether the properties purchase by the Kaw Housing Authority would be subject to police power jurisdiction of the City of Ponca City. With the intent and motivation not to permit the purchase of any existing residences by the Kaw Housing Authority, if such residences may become "Indian lands" and therefore be immune from police power jurisdiction of Ponca City, the City Council approved the Mayor's veto and denied the plaintiff the right to purchase residences within Ponca City for Indian families.

5. On February 17, 1988, in order to prohibit the purchasing of homes within Ponca City, the City acting under color of state statute, filed an action before the District Court of Kay County, Oklahoma (Cause No. C-89-45 PC, City of Ponca City v. Housing Authority of the Kaw Tribe of Indians of Oklahoma), seeking a permanent injunction prohibiting the Kaw Housing Authority from purchasing homes within Ponca City. The intent and motivation of the City of Ponca City in filing their action

was to prohibit any possible ownership of land within Ponca City by the Kaw Housing Authority and members of the Kaw Tribe of Indians of Oklahoma. The actions of Ponca City and its City Council were racially motivated to prohibit the ownership of property within the City of Ponca City and the exercise of any rights guaranteed to members of the Kaw Tribe of Indians. Further, said actions of the City of Ponca City had a disparate impact on Indians who were to be the beneficiaries of these homes through the Kaw Housing Authority.

6. On April 3, 1989, the District Court of Kay County, Oklahoma, issued a permanent injunction prohibiting the Kaw Housing Authority from the purchasing or ownership of residences within the city limits of Ponca City without the approval of the City of Ponca City or the Ponca City Housing Authority.

FIRST CAUSE OF ACTION

1. That the actions of the defendant, as alleged above, constitute a denial of the rights of the Housing Authority of the Kaw Tribe of Indians of Oklahoma and

members of the Kaw Tribe of Indians entitled to low income housing, to make and enforce contracts for the purchase of real properties as enjoyed by caucasian citizens with the city limits of Ponca City in violation of 42 U.S.C. §1981.

2. That the actions of the defendant were racially motivated in that it seeks to deny rights granted to members of the Kaw Tribe of Indians or members of other Indian tribes who are entitled to low income housing through the Kaw Housing Authority.

3. That as a direct and proximate result of the actions of the defendant, the plaintiff hired attorneys and expended attorney's fees for the defense of the above described lawsuit; lost is contract rights, and will suffer future damages which are undetermined at this time.

WHEREFORE, plaintiff demands injunctive relief by this Court requiring the defendant to allow plaintiff to purchase residences within the City of Ponca City, execute the Inter-local Cooperation Agreement defining the rights and responsibilities of the parties, for further

judgment for all damages suffered by the plaintiff for attorney's fees previously paid, increased valuation in homes purchased, prejudgment interest, attorney's fees for this action, and for such other and further relief as is deemed equitable and just.

SECOND CAUSE OF ACTION

1. That the actions of the defendant constitute a denial of the plaintiff's rights under the provisions of 42 U.S.C. §1982 to purchase, hold and convey real property.

2. That the actions of the defendant were racially motivated in that it seeks to deny the civil rights of the plaintiff and members of the Kaw Tribe of Indians of Oklahoma who are entitled to low income housing provided by plaintiff and the actions of the defendant resulted in racial discrimination against Indian people.

3. That as a direct and proximate result of the acts of the defendant, the plaintiff has suffered damage in the form of attorney's fees previously paid, increased costs of purchasing residences in Ponca city, and further damages.

WHEREFORE, plaintiff demands injunctive relief in this cause requiring the defendant to consent to the purchasing of residences within the City of Ponca City and the execution of the Inter-local Cooperation Agreement and judgment for all damages suffered by the plaintiff, including attorney's fees previously paid, increased valuation in homes purchased, prejudgment interest, attorney fees for the instant action, and such other and further relief as is deemed equitable and just.

THIRD CAUSE OF ACTION

1. That the defendant was acting under color of state statute when the City of Ponca City refused to allow the plaintiff to purchase homes in Ponca City and filed for injunctive relief before the Kay County District Court prohibiting the plaintiff from purchasing residences for low income Indian families within the City of Ponca City, which said conduct promoted or encouraged discrimination against Indian families, all in violation of the Fourteenth Amendment to the Constitution of the United States.

2. As a direct and proximate result of the conduct of the defendant, plaintiff has suffered damages in the form of attorney's fees previously paid, increased costs of purchasing residences in Ponca City, and further damages.

WHEREFORE, plaintiff demands injunctive relief in this cause requiring the defendant to consent to the purchasing of the residences within the City of Ponca City and the execution of the Inter-local Cooperation Agreement and judgment for all damages suffered by the plaintiff, including attorney's fees paid, lost escrow monies, increased valuation in homes purchased, prejudgment interest, attorney's fees, and such other and further relief as is deemed equitable and just.

FOURTH CAUSE OF ACTION

1. Plaintiff is an aggrieved party as defined by 42 U.S.C. §3602 claiming that the conduct of defendant, as alleged above, constitutes a discriminatory housing practice and the plaintiff is entitled to file this action under the provisions of 42 U.S.C. §3613.

2. The acts and conduct of the defendant constitute a discriminatory housing practice in that its refusal by the City of Ponca City, Oklahoma, to allow the purchasing of housing by plaintiff for low income Indian families is in violation of 42 U.S.C. §3604 and has a racially discriminatory effect.

3. The acts and conduct of the plaintiff are not based upon any compelling governmental interest but are in fact artificial, arbitrary and unnecessary barriers upon the plaintiff which have an effect of racial discrimination and result in the segregation of low income Indian families from residing in public housing within the City of Ponca City.

WHEREFORE, plaintiff demands injunctive relief by this Court requiring the defendant to consent to the purchasing of residences within the City of Ponca City, Oklahoma, by the plaintiff, Kaw Housing Authority; the execution of the Inter-local Cooperation Agreement defining the rights and responsibilities of the parties; the removal of all obstacles and barriers which prohibit the

ownership of residences by the Plaintiff for Indian families and a further judgment for all damages suffered by the plaintiff for attorney's fees previously paid in the defense of the defense of defendant's suit before the Kay County District Court, all lost escrow monies, increased valuations in homes to be purchased within Ponca City, Oklahoma, prejudgment interest, attorney's fees for the instant action, and for such other and further relief as is deemed equitable and just.

Respectfully submitted this 21st day of April, 1989.

JURY TRIAL DEMANDED.

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE HOUSING AUTHORITY OF THE KAW TRIBE OF INDIANS OF OKLAHOMA, Plaintiff, vs. THE CITY OF PONCA CITY, a Municipal Corporation, Defendant.	No.CIV-89-692-R

JUDGMENT

On this 22nd day of September, 1989, defendant's motion to dismiss pursuant to Rule 12(b)(6), Fed. R. Civ. Proc., comes on for hearing, the parties appearing by their attorneys. After reading the briefs and hearing the arguments, the court finds:

1. Insofar as the motion to dismiss asserts that the doctrine of *res judicata* bars plaintiff's claims, the motion to dismiss is denied.

2. Insofar as the motion to dismiss asserts,

however, that plaintiff lacks standing to bring this action, the motion to dismiss is hereby granted. As a state agency, plaintiff may not bring a constitutional challenge to the actions of another political subdivision under 42 U.S.C. §§ 1981, 1982 and 1983. Furthermore, plaintiff is not within the definition of an "aggrieved person" under the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq*.

Therefore, the motion to dismiss is hereby granted.

_____
David L. Russell
United States District Judge

APPROVED AS TO FORM:

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

THE HOUSING AUTHORITY OF THE KAW TRIBE OF INDIANS OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	No.CIV-89-692-R
THE CITY OF PONCA CITY, a Municipal Corporation,	)	
Defendant.	)	

ORDER

Before the Court is Plaintiff's motion to reconsider the Court's order granting Defendant's motion to dismiss Plaintiff's Complaint, announced after oral argument on that motion on September 22, 1989.

Plaintiff's motion directed to dismissal of its claims under 42 U.S.C. §§ 1981, 1982 and 1983 and under the Fourteenth Amendment of the United States Constitution is denied. Plaintiff is an agency of the State of Oklahoma which derives its very existence from the laws of that State. See Okla. Stat. tit. 63, § 1057 (1965). See also

Housing Authority of Choctaw Nation v. Crator, 600 P.2d 314 (Okla. 1979). While Plaintiff may also be a tribal organization, see United States v. Crossland, 642 F.2d 1113, 1114 (10th Cir. 1981); United States v. Logan, 641 F.2d 860, 862 (10th Cir. 1981) (creation by state statute or incorporation under state law does not preclude Indian housing authority or corporation from meeting the definition of an Indian tribal organization in 18 U.S.C. § 1163), recognition of an additional status or role of an Indian housing authority does not vitiate or negate its legal identity as a state agency. Cf. Ware v. Richardson, 347 F. Supp. 344, 347 (W.D. Okla. 1972) (the Kiowa Housing Authority "is nominally a state agency" while subject to the tribe's control). In short, Plaintiff's status may be dual, but it is not alternative, i.e. an "either-or" status.

Plaintiff's motion for reconsideration of dismissal of its claims under the Fair Housing Act, 42 U.S.C. § 3601 et seq. is also denied. Plaintiff is an "aggrieved person" under that Act, see 42 U.S.C. § 3602(i) only it if is a "person" as defined in that Act, see 42 U.S.C. § 3602(d).

That definition of "person" does not include a government, governmental agency, political subdivision, state or state agency. Compare with 42 U.S.C. § 2000e(a). Expressio unius est exclusio alterius.

Plaintiff's motion to reconsider dismissal of its Complaint is denied.

IT IS SO ORDERED this 9th day of March, 1990.

DAVID L. RUSSELL
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

THE HOUSING AUTHORITY OF THE KAW TRIBE OF INDIANS OF OKLAHOMA,	)	
Plaintiff,	)	
vs.	)	CIV-89-692-R
THE CITY OF PONCA CITY, a Municipal Corporation,	)	
Defendant.	)	

OFFICIAL COURT REPORTER'S TRANSCRIPT
OF MOTION PROCEEDINGS
HELD ON THE 22ND DAY OF SEPTEMBER, 1989
BEFORE THE HONORABLE DAVID L. RUSSELL,
IN OKLAHOMA CITY, OKLAHOMA

Appearing on behalf of the Plaintiff: Mr. Jack McCartney, Attorney at Law, P.O. Box 12, Newkirk, Oklahoma 73112; and Mr. Joseph Strealy, Attorney at Law, 3030 N.W. Expressway, Suite 330, Oklahoma City, Oklahoma 73112

Appearing on Behalf of the Defendant: Mr. Andrew Lester, Mr. James Bryant and Ms. Laura Ganz, Attorneys at Law 201 N. Grand, P.O. Box 3832, Enid, Oklahoma 73702

Reported by:
Mary E. (Liz) Waggoner, CSR, CP
Official Court Reporter
3315 U.S. Courthouse
Oklahoma City, Oklahoma 73102
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PROCEEDINGS

THE COURT: Let's see. The next matter is the Kaw -- The Housing Authority of the Kaw Tribe of Indians of Oklahoma vs. the City of Ponca City.

If the parties would make their appearances in that case, please?

MR. McCARTNEY: My name is Jack McCartney. I'm here on behalf of the Plaintiff. With me is Mr. Joseph Strealy of Oklahoma City, who also appears on behalf of the Plaintiff.

MR. LESTER: Your Honor, I'm Andrew Lester on behalf of the Defendant. I'm accompanied by my partners Laura Ganz and James Bryant.

And in the audience also is the Assistant City Attorney of Ponca City, Paula Johnson.

THE COURT: All right. I believe this is the City of Ponca City's motion to dismiss.

And Mr. Lester, did you wish to be heard?

MR. LESTER: Yes, Your Honor.

Your Honor, the basis of the motion is -- well, there

are three bases. But, maybe I can summarize them into two.

First is that the Kaw Housing Authority is not entitled to bring this type of a law suit.

The Kaw Housing Authority is created by State law. It's created under Title 63 of the Oklahoma Statutes. And according to Section 1057 of the Oklahoma Statutes, it is "an agency of the State of Oklahoma. It imposes all powers, right and functions herein specified for City and County authorities created pursuant to this Act."

And by comparing Section 1057 then with Section 1055 of Title 63, it becomes quite apparent that it is indeed a body politic of the State of Oklahoma.

Our contention is that we have before the Court today purely a matter of law.

No dispute about the facts. It's just simply a matter of law.

Is the Kaw Housing Authority entitled to bring this lawsuit under Sections 1981, 1982, 1983 and the Fair Housing Act of this title?

We assert that Kaw Housing Authority is not so entitled.

A review of the Constitutional history and of the Civil Rights Acts themselves, I believe, makes this clear.

Although it's not cited in the briefs, the Supreme Court opinion in Jet vs. Dallas, makes apparent that what we're dealing with here today is, at least under the three Civil Rights Statutes, is implementation of the 14th Amendment.

So, I'll take all three of those together.

Public entities and political subdivisions of a State do not enjoy Constitutional protections. At least, not vis-a-vis their creating State.

It makes no difference, Your Honor, whether the law suit is filed as political subdivision, Plaintiff, vs. State, Defendant or political subdivision vs. another political subdivision.

Either way, what we have here today is Kaw Housing Authority challenging the authority of the State which created it, to rule it.

The Supreme Court has long held this opinion. And it started back with Chief Justice John Marshall in the Dartmouth College vs. Woodward case and it's continued even through the present.

And, in fact, Chief Justice Rehnquist, about a year ago, wrote an opinion in the South Carolina vs. Baker case, which makes clear that States, even setting them aside from their political subdivisions, have very little standing whatsoever under the Constitution of the United States.

That case dealt with the 10th Amendment issue. It's not precisely on point by any means in this situation. But, it's illustrious of the fact the State and the political subdivisions, in particular, essentially do not have standing to raise Constitutional-types of issues to complaints they were deprived of Constitutional Rights.

And that's what we have here today.

At least, under Sections 1981, 1982 and 1983.

One case from the Tenth Circuit which illustrates the point is the City of Moore vs. Atchison-Topeka-Santa

Fe case, which is cited in the brief at page 4.

And that, too, reaffirms the fact that a political subdivision simply cannot bring a Constitutional challenge against the State that created it.

The Constitution Civil Rights Act were, especially the 14th Amendment, adopted for one reason in particular. And that was to protect citizens from an overbearing, overreaching Government.

The history of the 14th Amendment, and if you want to include the 13th Amendment because, indeed, Section 1981 originally was adopted as implementing the 13th Amendment, they both came out of the Civil War. They dealt with individual rights.

The 13th Amendment is quite different from any other part of the Constitution because it deals very specifically with individual conduct.

I believe it's the only part of the Constitution which specifically addresses what an individual may do.

In this instance, at least, the 14th Amendment does not tell me that I cannot regulate somebody else's due

process rights between that person and myself because I'm not the State.

But, the 13th Amendment, of course, says I cannot enslave somebody.

The 14th Amendment deals with due process, equal protection, those types of rights.

And that's what we have here is a question about due process and equal protection.

We're dealing with individual rights. Not with the right of one Governmental entity vis-a-vis another Governmental entity.

As we stated in the brief, the Civil Rights Acts have never existed to protect the Government itself.

And in allowing these types of actions, Your Honor, I believe would bring about a very strange situation where a Governmental entity would end up claiming that a private person acting under color of State law was depriving the Governmental entity of the Constitutional Right.

I don't think that's what the Constitutional framers

or Congress ever intended by adopting Amendment 14 or Sections 1981, '82 and '83.

The most on point case is Spence vs. Boston Edison case. That dealt with the housing authority as Plaintiff.

And in that case, the Court held that, "Governmental entities do not enjoy the Constitutional guarantees of due process and equal protection. They cannot assert a cause of action under 42 U.S.C. Section 1983."

And there are several other cases which essentially hold the same thing but doesn't state them quite so clearly as that one.

The only contrary authority, and I don't really even think it's contrary authority, deals with the concept of parens patriae suits.

But, this Circuit, the Tenth Circuit, has held that, "As parens patriae, a State may not assert claims on behalf of particular citizens," such as Indians, as opposed to non-Indians. That's the New Mexico vs. Aamodt case.

In any event, parens patriae suits, even if allowed, the only Circuit I've been able to find that has allowed this type of a law suit is the one governing Pennsylvania. And even that case was not quite the same as this one.

That deals with the State itself bringing the law suit and claiming State has much more Constitutional standing then a poiitical subdivision.

Under the Fair Housing Act, Your Honor, the question becomes, is the Plaintiff an aggrieved person. And it's simply a matter of Statutory construction.

Under Section 3602, the terms, person and aggrieved person are defined.

Aggrieved person, in order to be an aggrieved person, you have to be a person.

In order to be a person according to Section 3602 (d), you can be an individual, corporation, partnership, association, et cetera.

And in comparing that provision, Your Honor, with Title 7, Section 2000 (e) subdivision A, and that's where this language came from -- that was the Civil Rights Act

of 1964; this one being the Civil Rights Act of 1968 -- that language is almost exactly identical to this language except under Title 7.

The definition is as follows: "While the term person includes one or more individuals and these three terms are inserted: Government, Governmental Agency, Political Subdivisions."

And that's what we have here.

This entity is not allowed to bring this type of a law suit.

The challenge that the Plaintiff raises in response to our motion really doesn't even deal with these issues.

It simply is we're a tribal organization. And as a tribal organization, we're not a State agency.

That's based upon two cases. That's based upon the Ware vs. Richardson case and the U.S. vs. Crossland case.

A review of those cases shows that that's not what those cases held.

Those cases, Your Honor, simply said -- well, the

first one, the Ware case, this is a dispute between members of the tribe and board members or supposedly elected board members of the housing authority to be elected by the tribe. It's an internal dispute. It's an intratribal dispute. And as such, this Court has no jurisdiction to hear the case.

The Crossland case simply said that the Court does have jurisdiction under the privision [sic] in Title 18 to impose criminal sanctions upon the Defendant who was charged with committing crimes on tribal land.

The Court never said this is not a State agency.

And, indeed, the Oklahoma Supreme Court in responding to an argument based upon the Ware case, in the case, The Housing Authority of Choctaw Nation vs. Craytor, said that "An Indian Housing Authority is, indeed, a State agency, subject to the jurisdiction of the State Court. A housing authority matter involves the determination of State law."

And that's what we have here.

We have simply a determination of State law.

Nothing else.

What's the State law?

Does this housing authority have permission from the City of Ponca City to operate within the Ponca City area of operation?

According to the Statute, just reading the Statute, and frankly, simply reading the pleadings filed by the Plaintiff itself, quite clearly it does.

Plaintiff says that it went to seek that permission. Plaintiff says the permission was declined.

That's it.

It's simply a matter of State law.

It's not a matter of Federal Constitutional Rights.

Just simply dealing with what authority vis-a-vis one political subdivision Kaw Housing Authority has.

If State law requires -- excuse me. The State law requires Kaw Housing Authority to obtain the City's approval. The case is simply a squabble by Kaw Housing Authority with Oklahoma grant of authority to it.

That's what we have.

On that bases, we ask that the case be dismissed. It's simply a matter of the law.

This all goes to clarify why res judicata applies in this case as well.

This case has already been tried. It was tried in McKay [sic] County District Court.

Ponca City brought -- sought an injunction against the folks who are the Plaintiffs in this case.

Obviously, the parties were reversed in that one.

Ponca City sought an injunction, essentially trying to determine what the State law was. Did they need to get Ponca City's permission, yes or no?

A very simple matter.

The Court determined that issue. The Court determined the issue based upon a motion to dismiss and motion for summary judgment filed by Kaw Housing Authority.

THE COURT: Wasn't that -- they never really had an opportunity in that case to file a counterclaim.

MR. LESTER: That is their allegation.

Of course, under the Oklahoma Pleading Code, which is quite similar in this regard to the Federal Rules of Civil Procedure, Rule 12, they certainly had the opportunity. Instead of filing a motion to dismiss and motion for summary judgment, Kaw Housing Authority very easily could have filed an answer and a counterclaim.

And frankly, at the same time, they could have filed a motion for summary judgment.

But, they chose not to do so. It was their choice not to file an answer and counterclaim.

Their response to our motion to dismiss based upon res judicata is very simple. They say they weren't treated fairly in Ponca City or McKay [sic] County.

I think the law and the record shows otherwise.

Now, we've submitted, attached to our reply brief, certain documents.

I don't think the Court needs to consider those documents. But, when other documents were attached to our motion to dismiss and certain factual allegations were added to that, it occurred to me that Ponca City also

ought to be allowed to add to the record.

If so, then, Your Honor could treat this as a motion for summary judgment. But, I don't think Your Honor needs to do that.

I think just based simply on the pleading itself, the pleading shows that res judicata applies.

In fact, the pleading itself even pleads the prior State Court hearing. And says, what happened?

Well, what happened was Ponca City filed a law suit. They responded. They responded by filing a motion to dismiss for summary judgment.

Now, under Federal rule 56, it doesn't say whether this Court would have the authority to grant summary judgment against the moving party, although I have had that happen in a case that I've been involved with in this Court.

But, under Rule 13 of the Rules for the District Court of Oklahoma, quite plainly, a Court has that authority under Rule 13 and cited at page 4 of our reply brief, the Rule simply states 13 (e): "If it appears to the

Court that there is no substantial controversy as to any material fact, one of the parties is entitled to judgment as a matter of law. The Court shall render to said party whether or not he's the moving party."

That's what happened here.

No one forced Kaw Housing Authority to proceed that way. Kaw Housing Authority, if it feared it was going to be mistreated by McKay [sic] County District Court, had several options open to them. Before it filed a motion to dismiss and motion for summary judgment, Kaw Housing Authority under Section 2012, which is essentially the same as Federal Rule 12, could have filed an answer. And it chose not to do so.

It could have filed a counterclaim at that time. And chose not to do so.

Had it done so, it could have and, indeed, should have brought all of these issues to the Court because, frankly, I believe the Court would find these are mandatory counterclaims. It also arises out of the same transaction.

Oklahoma Section 2013 of Title 12 is quite similar to Federal Rule 13 in that regard.

Had it done so and feared the McKay [sic] County District Court was going to treat it unfairly, they could have immediately removed the action.

Didn't do so.

When Kaw Housing Authority fought the case on summary judgment, Kaw Housing Authority still had options open to it. It could have appealed this decision.

It chose not to do so.

The decision became a final judgment, unappealed from.

Now, what Kaw Housing Authority wants to do, Your Honor, is it wants this Court to retry the case, County case.

That is something that this Court should not do because of the Doctrine of Res Judicata, adopted, of course, by Title 28, Section 1738.

This case has already been decided. Under Section 1983, the law of res judicata is quite straight forward.

I would point to the Jarrett vs. Gramling case, which cites rather plainly the law on -- under Section 1983.

This Court looks to State law.

What does State law say?

Well, State law makes quite clear a couple of things.

A judgment on the merits precludes relitigation of the same underlying issues.

That judgment precludes a retrial, not only as to all matters which were brought up in Court, but all matters which could or might have been litigated in that Courtroom.

And I'd cite Your Honor to Citizens State Bank of Hugo vs. Hall, which is cited at pages 12 and 13 of our brief in chief.

A permanent injunction is a final judgment. That's what we have here.

We have essentially the same facts. We have essentially the same issues.

What's the issue? The authority of the Kaw Housing Authority to operate within Ponca City.

Res judicata applies, even though that action was not a Section 1981 action or 1982 action or 1983 action or a Fair Housing Act case.

Quoting from the Jarrett case, if I may, Your Honor: "Although Plaintiff's Section 1983 claims -- in that case termination from employment, a violation of Civil Rights -- different from the claims asserted in the State Court mandamus action -- that Plaintiff was entitled to a hearing to review his termination -- the underlying cause of action of both actions remains the same: Plaintiff's discharge from employment without due process hearing."

We have the same type of situation here, Your Honor. Same case, second time around.

Kaw Housing Authority lost in Ponca City. It shouldn't have the right to retry that case here today.

And therefore we ask that this Court grant the motion to dismiss.

THE COURT: Thank you, Mr. Lester.

Counsel.

MR. McCARTNEY: Your Honor, trying to follow Counsel's argument in the same order, I will address the Court that this question of standing, I think that's been settled for quite some time by various cases, some of which he did not cite.

And they have to do with the fact that this organization is representing a group of people and is not proceeding on its own behalf.

The Kaw Housing Authority is an instrumentality to provide low income homes to various clients which have yet to be decided.

The Kaw Housing Authority borrows money from HUD and uses that money to buy the homes and then after the homes are purchased, assigns those to certain people.

It proceeds not on its own behalf. But, it proceeds to those it represents.

That idea has been long recognized in the Supreme Court cases, which includes the Village of Arlington

Heights vs. Metro Housing, the Cazares vs. -- I forget the Defendant in that case, the Hunt vs. Washington/Apple case, which is cited in our brief.

But, we are proceeding on behalf of those people that are not identified.

If the Court would follow Counsel's argument, we have no standing to proceed and dismiss this action because the houses therefore have not been purchased and therefore not assigned, there is no one who can proceed on behalf of the proposed Indians for this housing.

You see, they have not been picked. So, we don't know who those clients are.

In that kind of situation, there is a special recognition by the Supreme Court that's a nonprofit association, such as this, can proceed on behalf of its clients.

Now, so far as Counsel has stated about this being a State agency, the Tenth Circuit has long ruled that these Indian associations are, in fact, an arm of the

Government.

The foundation of that is the Ware vs. Richardson, a case that actually came out of this Court by Judge Daugherty in which he said, "In legal consequence" -- and he recognized that was involving a Kiowa group -- "In legal consequence, however, it operates as an arm of the Kiowa tribe of Indians for it is completely controlled by them through their power of appointment. While it is nominally a state agency, it is statutorily freed of state control and subjected to unfettered control of the Tribe."

In citing that case, in the Crossland case before the Tenth Circuit, the Court says, "Thus, although the authority was organized pursuant to State law, its members were selected by the tribe," which is true here. "Its function was to serve the needs of the tribe," which is true here. "And its activities were supervised by the tribe," which is true here. Thus, appellant's argument that the Authority's creation by virtue of state statute precludes its characters as an Indian tribal organizations as unfounded."

Your Honor, though not arguing to believe, I wonder in my own mind whether the State of Oklahoma can create a state agency involving a sovereign nation. They have the Statute which does that. And I don't know that that's ever been tested. And I wish I had been more farsighted and raised that issue earlier.

It is the juices that flow when we approach the gun that causes us to have this brilliance.

But, I wonder if it could have ever had, could have truthfully organized such a group.

The Kaw Housing Authority operates as an arm of the Kaw Tribe. And even under its inherent power as part or that nation, it is not a State agency.

More importantly, the Craytor case, which is the Choctaw Housing Authority case, decided by the Oklahoma Supreme Court, is the only time its ever been decided.

And it seems in that case to have thumbed its nose at the previous decisions of this Court. And that court has never cited again. And I think the Tenth Circuit makes it

clear and recognizes the special distinction that this housing authority is operating for a limited group of people.

And for that reason, it's outside of this prohibition against the State agency suing another State agency.

Also, the City of Ponca City, again, one of those momentary flashes under the gun, the City of Ponca City is the home rule City. It's not a part or created by the State of Oklahoma.

It operates because it created itself and was recognized by the State of Oklahoma. And I don't think for that reason the prohibition applies either.

And there's a lot been said by Counsel that res judicata at any rate precludes us from proceeding.

We want to make it clear that we're not here, or the case, for the purpose of relitigating what the State Court did.

The State Court applied a State law. And we think properly interpreted that law in that circumstance.

But, the discrimination case that we have filed, the

violation of the Federal Housing law that we have filed is not that they didn't have the right to file the suit and apply the law.

The basis for our suit is that there was an evil heart in the City of Ponca City. There was discrimination as the motivating factor for that action.

Counsel said, well, we had full opportunity to defend ourselves.

In truth and fact, our cause of action, which brought this suit, never arose until that Judge reacted.

The facts are that the City of Ponca City was visited by the Kaw Tribe in the regular Council meeting and asked if they would sign a corroboration agreement, allowing the Kaw Housing Tribe to come into the City of Ponca City.

They granted initially that corroboration agreement.

Subsequently, the Mayor veto'd their vote, which under the Home Rule City Charter, he could do.

Thereafter, that followed another meeting with the Kaw Housing Authority. And the City refused at that

point to overturn this veto and ruled against allowing the Kaw Housing Authority to come into the City of Ponca City, based upon a fear that these Indians might exercise some of their rights to assert they have sovereign immunity for the property that they owned.

At that point, the Kaw Housing Authority was not being advised by me. But, being advised by HUD. And HUD told them to proceed.

Because they were proceeding and because they were going ahead to buy the home, the City of Ponca City filed this action.

They were not damaged until they were stopped by a Court's order from proceeding.

THE COURT: I don't know the background on why does the City of Ponca City have the right to veto over a housing authority's right to go in and purchase property within their City?

MR. McCARTNEY: That's a very good question, Judge.

Under the Statutes of the State of Oklahoma, we

have -- it's kind of not a very clear Statute. But, in the definitions part, it says that, "Housing Authorities which operate on a County line level must seek permission of a City or City Housing Authority to come into that City."

And that's in the definitions part of the Statute.

Then, over at the last is this idea to create a State Agency for Indians.

And there's some loose language in this Statute which says that those Indian Housing Authorities must operate in accordance with the rest of the law that's in this Fair Housing Chapter of our Statutes.

That would seem to indicate that they are much like a County line wide housing authority, even though Kaw -- a tribe has not existed within the County.

But, they say because it does seem to infer that the Indian Housing Authority must also act like a County line, it's incumbent upon it to seek the authority of the State to come in.

They went that procedure. The HUD people told them, you don't have to do that after all. And they tried

to go ahead, which was the foundation for this law suit.

Contracts had actually been signed on houses at the time this law suit was filed.

Because of action for the housing authority, therefore, this cause of action, they weren't damaged until the Judge walked off the bench. They weren't hurt until that time.

Any answer that there was discrimination prior to that time would have been a premature assertion of a right.

It's like saying, our answer, Judge, is we know you're going to rule against us, so here's our cause of action. That would have been a premature allegation.

Because it was all premature and because it was no cause of action which arose until he walked off the bench, there was no need to file an answer.

Let's assume though for a minute that we did have that obligation or had that -- should have done that, I think the cases pretty well state in Federal law, to preclude Coming into Federal Court, the Burden is upon the City to

show that we had a full adequate opportunity to litigate the case in State Court.

None of that occurred.

The best that could be said about that hearing is that we never got beyond opening statement.

There was never any evidence. There was never an answer which presented the issues to the Court.

And therefore, on appeal, there's no proper thing for the Supreme Court of Oklahoma to consider but the application of this law, which says the City has a right to object.

And, again, we don't object to that.

Had we appealed, the Supreme Court of Oklahoma would have said, because we would have had to have agreed, under that law, you have to get their permission.

But, this suit, this discrimination suit, is not about whether the law applies.

It's about whether there is discrimination as a motivating factor for trying to apply the law in the first place.

If there is the use of the Court system, which is motivated by the evil heart that is trying to keep these people from asserting their rights, then that's a violation which gets us into this Court.

When considering whether or not there should be res judicata, in Scroggins vs. Kansas Department of Human Resources, again, a Tenth Circuit case, the Court said, "After a clear indication from the record that the Plaintiff had a full and fair opportunity to be heard at the Trial Court level," and that case, it was in front of an Administrative Hearing, the Tenth Circuit went on to say, "We resist the imposition of res judicata to bar a Federal Plaintiff 1983 action."

We never had an opportunity to be heard in the State Court.

More importantly, we weren't injured until such time as the Judge walked off the bench.

I was there, Your Honor. I was the one who was asking -- because I didn't understand what the Judge had done, I was the one asking he set a bond.

We were there for a temporary injunction hearing.

He was to consider a temporary injunction.

We filed a motion to dismiss, which was to be heard at that time.

He jumped from that temporary injunction all the way to go and said, I grant a permanent injunction.

In my unclarity and stupidity, I asked for setting of a bond.

And he said, there's no need for a bond because this is a permanent injunction. And he left the bench.

Now, Your Honor, under those circumstances, it could never, ever be said that we had a full, fair and adequate opportunity to be heard upon the issues we now bring to this Court.

And if the Court grants to the Plaintiff their motion, that issue never will be heard.

THE COURT: Thank you. Anything further?

MR. LESTER: If I could just reply to a couple of points, Your Honor.

First, Your Honor, if there was no damage until the

Judge set the motion for summary judgment granted in favor of Ponca City, we've got the wrong party Defendant here. We need to have the Judge here.

Of course, I believe Section 1983 law would prohibit the Judge from being that Defendant.

But, we have the wrong party if there was no problem prior to that time.

Secondly, Counsel admits we have a State Agency. He questions what authority the State has to create this agency. Good question.

Under Title 42, U.S. Code Section 1436, F. 2nd, the U.S. Housing Act of 1937, Federal funds are made available to assist in the development of low income housing projects.

That program is administered by HUD.

It allows States to create public housing agencies or authorities to receive those funds.

Oklahoma did so.

That's the Housing Authority Act that is in Title 63.

This is not a tribe.

It may qualify under Title 18 for certain purposes as a tribal organization. But, it's not a tribe.

If it were a tribe -- well, I'd point Your Honor to the U.S. Supreme Court's opinion in Santa Clara/Pueblo vs. Martinez, 436 U.S. 49, which Justice Marshall states, "Indian tribes are distinct independent political communities, retaining their original natural rights in matters of local self-government."

We're not dealng [sic] with that entity today.

We're dealing with an arm of the State of Oklahoma.

It's created by State law. It's governed by State law.

It's a State agency.

As such, it's not entitled to bring this cycle of litigation.

Thank you.

THE COURT: Thank you.

Gentlemen, I would like to thank both of you for an excellent explanation of the issues on both sides of the

coin. Both are very helpful.

I'll go in reverse. I don't think the Doctrine of Res Judicata applies. It just doesn't strike me from what I've heard about the proceeding in the lower Court that the -- I guess, the Defendants in that instance, were given what is required. That is, being a full and adequate opportunity to litigate the issues in that State Court as a result of the action of summary judgment being entered summarily.

However -- so, I'll overrule the motion in regard to res judicata.

In regard to the standing issue, I think it's clear from the Statute that this agency, Kaw Housing Authority is, indeed, a State agency.

We need to look no further than the Statute. It needs no interpretation. It is a State agency.

I believe the Oklahoma Supreme Court in the case which Counsel cited said it's a body politic of the State of Oklahoma and an agency of the State.

Given that fact, I think it's clear that one State agency cannot sue another under the Civil Rights Acts,

1981, 1982, and 1983,

Further, under the Fair Housing Act, I subscribe to the position of the Defendant; that a Housing Authority is not an aggrieved person under the Fair Housing Act. That when you compare it to Title 7, I think it's clear that Congress intentionally omitted State Agencies as aggrieved persons.

So, in substance, the Court will deny the motion in regard to res judicata. But, will sustain the motion on the bases that one agency cannot sue another, has no standing to sue under the Statutes which have been cited, have no Constitutional protection under the 13th or 14th Amendments. Anything further?

MR. LESTER: No, Your Honor.

MR. McCARTNEY: May we be excused, Your Honor?

THE COURT: Yes. If you will prepare an order reflecting that, I would appreciate it, Mr. Lester.

Thank you, Gentlemen and Ladies, very much.

(WHEREUPON, the proceedings were concluded.)

Certificate of Court Reporter

I, Mary E. (Liz) Waggoner, Certified Shorthand Reporter and Holder of National Certificate of Proficiency, do hereby certify that the within and foregoing transcript of proceedings, is a true and correct record of said proceedings, as reported and transcribed by me as reflected herein.

Dated, this 24th day of October, 1989.

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Mary E. (Liz) Waggoner, CSR CP